The Thirteenth PART,

OR CERTAIN

Select CASES in LAW,

REPORTED BY

Sir *Edward Coke* Kt.

Late Lord Chief Juſtice of

ENGLAND,

And one of

His Majeſty's Council of STATE.

The Third Edition corrected, with the Addition of References.

With two exact Tables, *the one of the Names of the Caſes, and the other of the principal Matters therein contained.*

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edw. Sayer* Eſq;) for D. Browne, J. Walthoe, B. Lintot, R. Gosling, W. Mears, T. Ward, W. Innys, J. Osborn, T. Woodward, J. Hooke, F. Clay, T. Wotton, R. Williamson and A. Ward.

M DCC XXVII.

TO THE

READER.

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READER.

READER,

IT may ſeem altogether an unneceſſary Work to ſay any Thing in the Praiſe and Vindication of that Perſon and his Labours, which have had no leſs than the general Approbation of a whole Nation convened in Parliament: For if King *Theodorick* in *Caſſiodore* could affirm, *Neque enim dignus eſt a quopiam redargui qui noſtro judicio meretur abſolvi*, That no Man

ought to be reproved whom his Prince commends; how much rather then ſhould Men forbear to cenſure thoſe and their Works, which have had the greateſt Allowance and Atteſtation a Senate could give, and to acquieſce and reſt ſatisfied in that Judgment? Such Reſpect and Allowance hath been given to the learned Works of the late Honourable and Venerable Chief Juſtice, Sir *Edw. Coke*, whoſe Perſon in his Life-time was reverenc'd as an Oracle, and his Works (ſince his Deceaſe) cited as authentick Authorities, even by the reverend Judges themſelves. The Acceptance his Books (already extant) have found with all knowing Perſons, have given me the Confidence to commend to the

publick View ſome Remains of his, under his own Hand-writing, which have not yet appeared to the World, yet (like true and genuine Eaglets) are well able to behold and bear the Light: They are of the ſame Piece with his former Works, and in Reſpect of their own native Worth, and the Reference they bear to their Author, cannot be too highly valued: Though, in Reſpect of their Quantity and Number, the Reports are but few; yet, as the skilful Jeweller will not loſe ſo much as the very Filings of rich and precious Metals; and the very Fragments were commanded to be kept where a Miracle had been wrought, *Propter miraculi claritatem & evidentiam*: So theſe ſmall Parcels, being

being Part of thoſe vaſt and immenſe Labours of their Author, great almoſt to a Miracle, (if I may be allowed the Compariſon) were there no other Uſe to be made of them (as there is very much; for they manifeſt and declare to the Reader many ſecret and abſtruſe Points in Law, not ordinarily to be met with in other Books ſo fully and amply related) deſerve a Publication, and to be preſerved in the Reſpects and Memories of Learned Men, and eſpecially the Profeſſors of the Law; and to that End they are now brought to Light and publiſhed.

Farewel

J. G.

THE

THE NAMES OF THE CASES.

Mutton's

Mich. An. 6 Jac. *Regis.*

In the Common Pleas.

Willowes's *Case.*

IN Treſpaſs brought by *Richard Stallon*, one of the Attornies of the Court againſt *Thomas Brayde* (which began in *Eaſter* Term, *An.* 6 *Jacobi Rot.* 1845.) for breaking of his Houſe and Cloſe at *Fenditton* in the County of *Cambridge*; and the new Aſſignment was in an Acre of Paſture: The Defendant pleads, that the Place where, &c. was the Land and Freehold of *Thomas Willowes* and *Richard Willowes*; and that he as Servant, &c. And the Plaintiff for Replication ſaith, that the Place where, was Parcel of the Manor of *Fenditton*, and demiſable, &c. by Copy of Court-Roll in Fee-ſimple: And that the Lords of the Manor granted the Tenements in which, &c. to *John Stallon* and his Heirs, who ſurrendered them unto the ſaid *Willowes* and *Willowes*, Lords of the ſaid Manor, to the Uſe of the Plaintiff and his Heirs, who was admitted accordingly, &c. The Defendant doth rejoin, and ſaith, That well and true it is, that the Tenements in which, &c. were Parcel of the Manor, and demiſable, &c. And the Surrender and Admittance ſuch, *prout*, &c. But the ſaid *Thomas Brayde* further ſaith, that the Tenements in which, &c. at the Time of the Admiſſion of the ſaid *Richard Stallon*, were, and yet are of the clear yearly Value of fifty-three Shillings and four Pence; and that within the ſaid Manor there is ſuch a Cuſtom, *Quod rationabilis denariorum ſumma legalis monetæ Angliæ ſuper quamlibet admiſſionem cujuſlibet perſonæ, ſive quarumcunque perſonarum tenent' vel tenent' per Dom' vel Dominos manerii prædict' ſive per Seneſchallum, &c. ad aliquas terras ſive tenementa Cuſtomaria Manerii prædict' ſecundum conſuetudinem Manerii illius debetur, & a tempore quo, &c. debit' fuit Dom', &c. tempore ejuſdem admiſſionis pro fine pro admiſſione*

Copyhold Fine reaſonable. See Moor 622, 623. Cro. Eliz. 351, 379. Cro. Jac 196, or 256. Co. Lit. 59. b. 60. a. 4 Co. 27. b Cumberb. 44.

miſſione illa, quod idem Dominus, vel iidem Dom' prædict' vel Seneſchallus ſuus Curiæ ejuſdem Manerii pro tempore exiſten' uſus fuit, vel uſi fuerunt per totum tempus ſupradict' in plena curia Manerii illius pro admiſſione ejuſdem perſonæ, ſeu earundem perſonarum ſic facta aſſidere & appunctuare, Anglice, to aſſeſs and appoint *eandem rationabilem denariorum ſummam pro fine pro eadem admiſſione ſic ut præfertur facta, nec non ſuperinde eandem denariorum ſummam ſic aſſeſſam & appunctuatam, præfatæ perſonæ ſive perſonis ſic admiſſæ ſive admiſſis, ſolveret & ſolverent, &c. eidem Domino, &c. predictam rationabilem denariorum ſummam pro fine, pro admiſſione ſua predict' ſic aſſeſſam & appunctuat'.* And further ſaith, That the Steward of the ſaid Manor at a Court holden 1 *Octob.* in the fourth Year of the Reign of the King that now is, admitted the Plaintiff to the Tenements, in which, &c. and aſſeſſed and ſet a reaſonable Sum of Money, that is to ſay, five Pounds ſix Shillings, eight Pence, that is to ſay, *Valorem eorundem tenementorum per duos annos, & non ultra pro fine pro predict' * admiſſione predict' Ricard' Stallon*, to the ſaid Lords of the Manor to be paid: And alſo the ſaid Steward at the ſame Court did give Notice, and ſignify to the Plaintiff the ſaid Sum was to be paid to the ſaid Lords of the Manor, &c. And further ſaith, that the ſaid *Willowes* and *Willowes*, afterwards, that is to ſay, the ſecond Day of *November*, in the fourth Year aforeſaid, at *Fenditton* aforeſaid, requeſted the ſaid *Richard Stallon* to pay to them five Pounds, ſix Shillings, eight Pence there, for the Fine for his Admittance, &c. which the ſaid *Rich. Stallon* then and there utterly denied and refuſed, and as yet doth refuſe. By which the ſaid *Richard Stallon* forfeited to the aforeſaid *Thomas* and *Richard Willowes* all his Right, Eſtate, &c. of and in the Tenements aforeſaid, in which, &c. The Plaintiff ſurjoineth, and ſaith, that the ſaid Sum of five Pounds, ſix Shillings, eight Pence, &c. was not *rationabilis finis*, as the ſaid *Thomas Brayde* above hath alledged, &c. upon which the Defendant doth demur in Law. And in this Caſe theſe Points were reſolved by *Coke* Chief Juſtice, *Walmſley*, *Warberton*, *Daniel*, and *Foſter*, Juſtices. 1. And principally, if the Fine aſſeſſed had been reaſonable, yet the Lords ought to have ſet a certain Time and Place when the ſame ſhould be paid, becauſe the ſame ſtands upon a Point of Forfeiture: As if a Man bargains and aſſures Land to one and his Heirs, upon Condition that if he pay to the Bargainee or his Heirs, ten Pounds at ſuch a Place, that he

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and

and his Heirs ſhall re-enter: In that Caſe, becauſe no Time is limited, the Bargainor ought to give Notice to the Bargainee, &c. when he will tender the Money, and he cannot tender it when he pleaſeth; and with that agrees 19 *Eliz. Dyer* 354. For a Man ſhall not loſe his Land, unleſs an expreſs Default be in him; and the Bargainee in ſuch Caſe is not tied to ſtay always in the Place, &c. So in the Caſe at Bar, the Copyholder is not tied to carry his Fine always with him, when he is at Church, or at Plough, &c. And although that the Rejoinder is, that the Plaintiff refuſed to pay the Fine; ſo he might well do, when the Requeſt is not lawful nor reaſonable, for in all Caſes when the Requeſt is not lawful nor reaſonable, the Party may without Prejudice deny the Payment. And he who is to pay a great Fine as 100 *l.* or more, it is not reaſonable that he carry it always with him in his Pocket, and preſently the Copyholder was not bound to it, becauſe that the Fine was uncertain and arbitrable; as it was reſolved in *Hubbard's* Caſe in the fourth Part of my Reports amongſt the Copyhold Caſes. 2. It was reſolved, that although the Fine be uncertain and arbitrable, yet it ought to be *ſecundum arbitrium boni viri*: And it ought to be reaſonable and not exceſſive; for all Exceſſiveneſs is abhorred in Law, *Exceſſus in re qualibet jure reprobatur communi*; for the Common Law forbids any exceſſive Diſtreſs, as it appeareth in 41 *E.* 3, 26. Where a Man avowed the Taking of ſixty Sheep for 3 *d.* Rent, and the Plaintiff prayed that he might be amerced for the Diſtreſs: And the Court (who is always the Judge whether the Diſtreſs be reaſonable or exceſſive) held, that ſix Sheep had been a ſufficient Diſtreſs for the ſaid Rent, and therefore he was amerced for ſo many of them as were above ſix Sheep: And the Court ſaid, that if the Avowant ſhall have Return, he ſhall have a Return but of ſix Sheep: And this appeareth to be the Common Law; for the Statute of *Articuli ſuper Chartas* extends only where a grievous Diſtreſs is taken for the King's Debt. See *F. N. B.* 174. *a.* and 27 *Aſſ.* 51. 28 *Aſſ.* 30. 11 *H.* 4. 2. and 8 *H.* 4. 16, &c. *Non Capiatur gravis diſtrictio*, &c. And ſo if an exceſſive or an unreaſonable Amerciament be impoſed in any * Court-Baron or other Court which is not of Record, the Party ſhall have *moderata miſericordia*: And the Statute of *Magna Charta* is but an Affirmance of the Common Law in ſuch Point.

4 Co. 25. b.

Vid. F. N. B. 87. a reaſonable Aid incertain until the Statute of Glanvil. lib 9. fol. 70. 14 H. 4. 9. by Hill. 14 H. 4. 1. a.

Page [3] See Glanvil lib. 9. cap. 8. Optime, & rationabilibus auxiliis, ita ra- facultates ut quod rationem

men moderat' ſecundum quantitatem feodorum ſuorum & ſecundum hemini gravidæ viderentur, &c. Vide B action 84. b. rationab' relev' 1. & menſuram non excedat; and ſee him there 86, &c. optime.

See *F. N. B.* 75. *Nullus liber homo amercietur niſi ſecundum quantitatem delicti.* And *gravis Redemptio non eſt exigenda.* And the Common Law gives an Aſſiſe of Sovient Diſtreſs, and Multiplication of Diſtreſs found, which is exceſſive, in Reſpect of the Multiplicity of Vexation. And therewith agreeth 27 *Aſſ.* 30, 51. *Non capiatur multiplex diſtrictio, F. N. B.* 178. *b.* And if Tenant in Dower hath Villains, or Tenants at Will who were rich, and ſhe by exceſſive Tallages and Fines makes them poor and Beggers, the ſame is adjudged Waſte. And therewith agreeth *F. N. B.* 61. *b.* 16 *H.* 3. Waſte 135, and 16 *H.* 7. And ſee the Regiſter judicial, *fol.* 25. *b.* Waſte lieth, *in exulando Henricum, & Hermanum, &c. Villeios, Quorum quilibet tenet unum Meſſuagium & unam virgat' terræ, in villinagio in prædict' villa de T.* by grievous and intolerable Diſtreſſes: By all which it appeareth, that the Common Law doth forbid intolerable and exceſſive Oppreſſing and Ranſoming of Villains, whereby of Rich they become Poor: And yet it may be ſaid, that a Man may do with his Villain what he pleaſeth, or with his Tenant at Will; but the Lord limits the ſame in a reaſonable and convenient Manner: For it appeareth, that ſuch intolerable Oppreſſion of the poor Tenants is to the Diſinheriſon of him in the Reverſion. So in the Caſe at Bar, although the Fine is incertain, yet it ought to be reaſonable; and ſo it appeareth by the ſaid Cuſtom which the Defendant hath alledged. And therefore in ſuch Caſe the Lord cannot take as much as he pleaſeth, but the Fine ought to be reaſonable, according to the Reſolve of the Court in the ſaid Caſe of *Hubbard* in the fourth Part of my Reports 30. It was reſolved, That if the Lord and Tenant cannot agree of the Fine, but the Lord demandeth more than a reaſonable Fine, that the ſame ſhall be decided and adjudged by the Court, in which any Suit ſhall be, for or by Reaſon of the Denying of the Fine, and the Court ſhall adjudge what ſhall be ſaid a reaſonable Fine, having Regard to the Quality and Value of the Land, and other neceſſary Circumſtances which ought to appear in Pleading upon a Demurrer, or found by Verdict: And if the Fine which the Lord or his Steward aſſeſſeth be reaſonable, let the Copyholder well adviſe himſelf before he deny the Payment of it: And always when Reaſonableneſs is in Queſtion, the ſame ſhall be determined by the Court in which the Action dependeth: As Reaſonable Time, 21 *H.* 6. 30. 22 *E.* 4. 27. & 29 *H.* 8. 32, *&c.* So if the Diſtreſs be reaſonable, and the like, *&c.*

Vide 14 H. 4. 4. by Hil.

Bracton l. 2. fol. 51. Quam longum debet eſſe tempus non definitur in jure, ſed pendet ex juſticiariorum diſcretione.

It was resolved, That the said Fine in the Case at the Bar was unreasonable, *viz.* to demand for a Cottage and an Acre of Pasture, five Pounds, six Shillings, eight Pence, for the Admittance of a Copyholder in Fee simple upon a Surrender made; for this is not like to a voluntary Grant, as when the Copyholder hath but an Estate for Life, and leaseth, or if he hath an Estate in Fee-simple, and committeth Felony, there *Arbitrio Domini res æstimari debet*; but when the Lord is compellable to admit him to whose Use the Surrender is, and when *Cestuy que use* is admitted, he shall be in by him who made the Surrender, and the Lord is but an Instrument to present the same: And therefore in such Case the Value of two Years for such an Admittance is unreasonable, especially when the Value of the Cottage and one Acre of Pasture is a Rack, at fifty-three Shillings by the Year.

5. It was resolved, That the Surrejoinder is no more than what the * Law saith, For in this Case in the Judgment of the Law the Fine is unreasonable; and therefore the same is but *ex abundanti*; and now the Court ought to judge upon the whole special Matter; and for the Causes aforesaid, Judgment was given for the Plaintiff. *Page* [4]

And *Coke* Chief Justice said in this Case, That where the Usage of the Court of Admiralty is to amerce the Defendant for his Default by his Discretion, as it appeareth in 19 *H.* 6, 7. That if the Amerciament be outragious and excessive, the same shall not bind the Party, and if it be excessive or not, it shall be determined in the Court in which the Action shall be brought for the Levying of it: And the Writ of Account is against the Bailiff, or Guardian, *Quod reddat ei rationabilem Computum de exitibus Manerii.* And the Law requireth a Thing which is reasonable, and no Excess or Extremity in any Thing.

II. *Mich.* 6 Jacobi.

In the Common Pleas.

Porter *and* Rochester's *Case.*

The Statute of 23 H. 8. c. 9. of citing out of Dioceſes. See 5 Co. 9. 12 Co. 77. Gibſon's Cod. 1046, & 1050. Poſt. 15, &c.

THIS Term *Lewis* and *Rocheſter* who dwelt in *Eſſex* within the Dioceſe of *London*, were ſued for Subſtraction of Tithes growing in *B.* within the County of *Eſſex*, by *Porter*, in the Court of the Arches of the Biſhop of *Canterbury* in *London*. And the Caſe was, That the Archbiſhop of *Canterbury* hath a peculiar Juriſdiction of fourteen Pariſhes, called a Deanery, exempted from the Authority of the Biſhop of *London*, whereof the Pariſh of S. *Mary de Arcubus* is the Chief: And the Court is called the *Arches*, becauſe the Court is holden there; and a great Queſtion was moved, if in the ſaid Court of Arches holden in *London* within his *Peculiar*, he might cite any dwelling in *Eſſex* for Subſtraction of Tithes growing in *Eſſex*; or if he be prohibited by the Statute of the twenty-third Year of King *Henry* the Eighth, *c.* 9. And after that the Matter was well debated as well by Counſel at the Bar, as by Dr. *Ferrard*, Dr. *James*, and others in open Court; and laſtly, by all the Juſtices of the Common Pleas, a Prohibition was granted to the Court of *Arches*. And in this Caſe divers Points were reſolved by the Court.

See the Proem to the Codex 20, 21. 2 Co. 44, 45, &c. 5 Co. 9, 16, 20. 12 Co. 63. 11 Co. 25. 12 Co. 63. Poſt. 14, 15, &c. * 5 Co. 23.

1. That all Acts of Parliament, made by the King, Lords and Commons of Parliament, are Parcel of the Laws of *England*, and therefore ſhall be expounded by the Judges of the Laws of *England*, and not by the Civilians and Commoniſts, although the Acts concern Eccleſiaſtical and Spiritual Juriſdiction; and therefore the Act of * 2 *H.* 4. *cap.* 15. by which in Effect it is enacted, *Quod nullus teneat, doceat, informet, &c. clam, vel publice aliquam nefandam opinionem contrariam fidei Catholicæ ſeu determinationi Eccleſiæ ſacroſanctæ, nec de hujuſmodi ſecta, & nefandis Doctrinis Conventiculas faciat:* And that in ſuch Caſes, the *Dioceſan* might arreſt and impriſon ſuch Offender, *&c.* And in 19 *H.* 7. the Biſhop of *London* commanded one to be impriſoned, becauſe that the Plaintiff ſaid that he

he ought not to pay his Tithes to his Curate; and the Party ſo impriſoned brought an Action of falſe Impriſonment againſt thoſe who arreſted him by the Commandment of the Biſhop; and there the Matter is well argued, What Words are within the ſaid Statute, and what without the Statute: So upon the ſame Statute it was reſolved in 5 *E.* 4. in *Keyſar's* Caſe in the * King's Bench, which you may ſee in my Book of Precedents: And ſo the Statutes of *Articuli Cleri*, *de Prohibitione regia*; *de circumſpecte agatis*, of 2 *E.* 6. *cap.* 13. and all other Acts of Parliament concerning Spiritual Cauſes, have always been expounded by the Judges of the Common Law; as it was adjudged in *Wood's* Caſe, *Paſch.* 29 *Eliz.* in my Notes, *fol.* 22. So the Statute of 21 *H.* 8. *cap.* 13. hath been expounded by the Judges of the Realm concerning Pluralities, and the having of two Benefices: *Common Laws and Diſpenſations*, ſee 7 *Eliz. Dyer* 233. The King's Courts ſhall adjudge of *Diſpenſations* and *Commendams*: See alſo 17 *Eliz. Dyer* 251. 14 *Eliz. Dyer* 312. 15 *Eliz. Dyer* 327. 18 *Eliz. Dyer* 352 & 347. 22 *Eliz. Dyer* 377. *Conſtruction of the Statute cap.* 12. *Smith's* Caſe, concerning Subſcription which is a meer Spiritual Thing. Alſo it appeareth by 32 *Eliz. Dyer* 377. That for want of Subſcription the Church was always void by the ſaid Act of 23 *El.* and yet the Civilians ſay, that there ought to be a *Sentence Declaratory*, altho' that the Act maketh it void.

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1, 2 Co. 44, 45, &c.
5 Co. 9.
11 Co. 10, 14, 16.

Stat. 23 El. c. 1, 2.
See Parſon's Clergyman. 11, 50 & 52.
4 Inſt. 323, 324.

2. It was reſolved by *Coke* Chief Juſtice, *Warberton*, *Daniel* and *Foſter* Juſtices, That the Archbiſhop of *Canterbury* is reſtrained by the Act of 23 *H.* 8. *cap.* 9. to cite any one out of his own Dioceſe, or his peculiar Juriſdiction, altho' that he holdeth his Court of *Arches*, within *London*. And firſt it was objected.

That the Title of the Act is, *An Act that no Perſon ſhall be cited out of the Dioceſe where he or ſhe dwelleth, except in certain Caſes*: And here the Archbiſhop doth not cite the ſaid Party dwelling in *Eſſex*, out of the Dioceſe of *London*, for he holdeth his Court of *Arches* within *London*.

2. The Preamble of the Act is, Where a great Number of the King's Subjects dwelling in divers Dioceſes, &c. And here he doth not dwell in divers Dioceſes.

3. Far out of the Dioceſe where ſuch Men, &c. dwell, and here he doth not dwell far out, &c.

4. The Body of the Act is, No manner of Perſon ſhall be cited before any Ordinance, &c. out of the Dioceſe or peculiar Juriſdiction where the Perſon ſhall be inhabiting, &c. And here he was not cited out of the Dioceſe of *Lon-*

don. To which it was anſwered and reſolved, That the ſame was prohibited by the ſaid Act for divers Cauſes.

See Weſenbeck's Oeconomics, fo. 264. Calepine in verbo.

1. As to all the ſaid Objections, one Anſwer makes an End of them all: For *Diœceſis dicitur diſtinctio, vel diviſio, ſive gubernatio, quæ diviſa, & diverſa eſt ab Eccleſia alterius Epiſcopatus, & Commiſſa Gubernatio in unius*; and is derived *a Di quod eſt duo, & electio, id eſt, ſeparatio, quia ſeparat duas Juriſdictiones*: So Dioceſe ſignifies the Juriſdiction of one Ordinary ſeparated and divided from others; and becauſe the Archbiſhop of *Canterbury* hath a peculiar Juriſdiction in *London*, exempt out of the Dioceſe or Juriſdiction of the Ordinary or Biſhop of *London*: For that Cauſe it is fitly ſaid, in the Title, *Preamble*, and Body of the Act, That when the Archbiſhop ſitting in his exempt Peculiar in *London*, cites one dwelling in *Eſſex*, he cites him out of the Dioceſe or Juriſdiction of the Biſhop of *London*, *ergo* he is cited out of the Dioceſe: And in the Clauſe of the Penalty of ten Pounds, it is ſaid, out of the Dioceſe or other Juriſdiction where the Party dwelleth, which agreeth with the Signification of Dioceſe before. And as to the Words, *Far off*, &c. they were put in the Preamble, to ſhew the great Miſchief which was before the Act: As the Stat. of 32 *H.* 8. *c.* 33. in the *Preamble*, it is Diſſeiſins with Strength, and the Body * of the Act ſaith, *ſuch Diſſeiſor*, yet the ſame extendeth to all Diſſeiſors, but Diſſeiſin with Force was the greateſt Miſchief, as it is holden in 4 & 5 *Eliz. Dyer* 219. So the Preamble of the Statute of *Weſt.* 2. *cap.* 5. is, Heirs in Ward, and the Body of the Act is, *Hujuſmodi præſentat.* as it is adjudged in 44 *E.* 3. 18. That an Infant who hath an Advowſon by Deſcent, and is out of Ward, ſhall be within the Remedy of the ſaid Act, but the Frauds of the Guardians was the greater Miſchief. So the Preamble of the Act of 21 *H.* 8. *cap.* 15. which gives falſifying of Recoveries, recites in the *Preamble*, That divers Leſſees have paid divers great Incomes, &c. Be it enacted, That all ſuch Termors, &c. and yet the ſame extends to all Termors: and yet all theſe Caſes are ſtronger than the Caſe Bar, for there that Word (*ſuch*) in the Body of the Act referreth the ſame to the *Preamble*, which is not in our Caſe.

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2. The Body of the Act is, No manner of Perſon ſhall be henceforth cited before any Ordinary, &c. out of the Dioceſe or peculiar Juriſdiction where the Perſon ſhall be dwelling: And if he ſhall not be cited out of the Peculiar before any Ordinary, a *Fortiori*, the Court of Arches which ſits in a Peculiar, ſhall not cite others out of another Dioceſe;

ceſe: And theſe Words, *Out of the Dioceſe*, are to be meant out of the Dioceſe or Juriſdiction of the Ordinary, where he dwelleth; but the exempt Peculiar of the Archbiſhop is out of the Juriſdiction of the Biſhop of *London*, as S. *Martins*, and other Places in *London*, are not Part of *London*, although they are within the Circumference of it.

3. It is to be obſerved, That the Preamble reciting of the great Miſchief, recites expreſly, That the Subjects were called by compulſory Proceſs to appear in the Arches, Audience, and other high Courts of the Archbiſhoprick of this Realm; ſo as the Intention of the ſaid Act was to reduce the Archbiſhop to his proper Dioceſe or peculiar Juriſdiction, unleſs it were in five Caſes.

1. For any Spiritual Offence or Cauſe committed or omitted contrary to the Right and Duty by the Biſhop, &c. which Word *(omitted)* proves that there ought to be a Default in the Ordinary.

2. Except it be in caſe of Appeal, and other lawful Cauſe wherein the Party ſhall find himſelf grieved by the Ordinary after the Matter or Cauſe there firſt begun; *ergo* the ſame ought to be firſt begun before the Ordinary.

3. In caſe that the Biſhop of the Dioceſe, or other immediate Judge or Ordinary dare not, or will not convent the Party to be ſued before him; where the Ordinary is called the immediate Judge, as in Truth he is; and the Archbiſhop, unleſs it be in his own Dioceſe (theſe ſpecial Caſes excepted) mediate Judge, *ſcil.* by Appeal, &c.

4. Or in Caſe that the Biſhop of the Dioceſe, or the Judge of the Place within whoſe Juriſdiction, or before whom the Suit by this Act ſhould be begun and proſecuted, be Party directly or indirectly to the Matter or Cauſe of the ſame Suit; which Clauſe in expreſs Words is a full Expoſition of the Body of the Act, *ſcil.* That every Suit (others than thoſe which are expreſſed) ought to be begun and proſecuted, before the Biſhop of the Dioceſe, or other Judge of the ſame Place.

5. In caſe that any Biſhop, or any inferior Judge, having under him Juriſdiction, &c. make Requeſt or Inſtance to the Archbiſhop, Biſhop, or other inferior Ordinary or Judge, and that to be done in Caſes only where the Law Civil or Common doth affirm, &c. By which it fully appeareth, That the Act intendeth, That every Ordinary and * Eccleſiaſtical Judge ſhould have the Conuſance of Cauſes within their Juriſdiction, without any concurrent Authority or Suit by way of Prevention: And by this, the Subject hath great Benefit as well by ſaving of Travel and Charges to have Juſtice in his Place of Habitation, as to

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be

be judged where he and the Matter is beſt known; as alſo that he ſhall have many Appeals as his Adverſary in the higheſt Court at the firſt. Alſo there are two *Proviſoes* which explain it alſo, *ſcil.* That it ſhall be lawful to every Archbiſhop to cite any Perſon inhabiting in any Biſhop's Dioceſe within his Province, for Matter of Hereſy, (which were a vain *Proviſo*, if the Act did not extend to the Archbiſhop: But by that ſpecial *Proviſo* for Hereſy, it appeareth, that, for all Cauſes not excepted, is prohibited by the Act) then the Words of the *Proviſo* go further, if the Biſhop or other Ordinary immediately hereunto conſent, or if the ſame Biſhop or other immediate Ordinary or Judge do not his Duty in Puniſhment of the ſame; which Words immediately and immediate expound the Intent of the Makers of the Act.

2. There is a Saving for the Archbiſhop, the Calling any Perſon out of the Dioceſe where he ſhall be dwelling to the Probate of any Teſtaments; which *Proviſo* ſhould be alſo in vain, if the Archbiſhop notwithſtanding that Act ſhould have concurrent Authority with every Ordinary through his whole Province: Wherefore it was concluded that the Archbiſhop out of his Dioceſe, unleſs in the Caſes excepted, is prohibited by the Act of 23 *H.* 8. to cite any Man out of any other Dioceſe. And in Truth the Act of 23 *H.* 8. is but a Law declaratory of the ancient Canons, and of the true Expoſition of them: And that appeareth by the Canon, *Cap. Romana in ſexto de Appellationibus*, and *Cap. de Competenti in ſexto.* And the ſaid Act is ſo expounded by all the Clergy of *England*, at a Convocation in *London*, *An.* 1 *Jac. Regis* 1603. *Canon* 94. Where it is decreed, ordained and declared, That none ſhould be cited to the Arches or Audience, but the Inhabitants within the Archbiſhop's Dioceſe, or Peculiar, other than in ſuch particular Caſes only as are expreſly excepted and reſerved in and by a Statute, *Anno* 23 *H.* 8. *cap.* 9. And the King by Letters Patent under the Great Seal hath given his Royal Aſſent to this amongſt others from Time to Time to be obſerved, fulfilled and kept, as well by the Archbiſhop of *Canterbury*, the Biſhops and their Succeſſors, and the reſt of the whole Clergy of the Province of *Canterbury*, in their ſeveral Callings, Offices, Functions, Miniſteries, Degrees and Adminiſtrations; as alſo by all and every Dean of the Arches, and other Judge of the ſaid Archbiſhop's Courts, Guardians of Spiritualities, Chancellors, *&c.* So the ſame is alſo expreſly confirmed under the Great Seal. And although the Archbiſhoprick of *Canterbury* was then void, yet the Guardian of the Spiritualties was there, and the Arch-

The Act of 23 H. 8. is a Declaration of the old Canon Law. Gibſon's Cod. 1046, 1050.

Canon 1 Jac. at the Synod at London. Vi. Linwood de excuſationibus, 200. Lit. m. 5. & pag. 2. L. a.

Archbiſhop of *Canterbury* that now is, and then Biſhop of *London*, was by Letters Patent, Preſident of the ſaid Council in the Place of the Archbiſhop then deceaſed: And the King gave his Royal Aſſent to the ſame, and the ſaid Canon is of as full Force as if the ſaid late Archbiſhop of *Canterbury* had been then alive. And whereas it is ſaid in the Preamble of the Act, in the Arches, Audience, and other high Courts of the Archbiſhop of this Realm; it is to be known, That the Archbiſhops of this Realm before that Act had Power Legatine from the Pope, by which they pretended to have not only ſupereminent Authority over all, but concurrent Authority with every Ordinary in his Dioceſe, not as Archbiſhop of *Canterbury*, *&c.* but by his Power and * Authority Legatine: For *Sunt tria genera Legatorum.* 1. *Quidam de latere Dom. Papæ mittuntur, ut Cardinales quos appellant fratres.* 2. *Alii ſunt Dativi, & non de latere, qui ſimpliciter in Legatione mittantur, &c.* 3. *Sunt Nati, ſive Nativi, qui ſuarum Eccleſiarum prætextu legatione fungantur, & Tales ſunt quatuor, ſcil. Archiepiſcopus Cant. Eboracenſis, Remanenſis, & Piſanis.* So as before that Act, the Archbiſhop of *Canterbury*, was *Legatus Natus*, and by Force of his Authority Legatine uſurped againſt the Canons upon all the Ordinaries in his Precinct, and by Colour thereof claimed current Authority with 'em, which altho' they held in the Courts of the Arbhbiſhop, the ſame was remedied by the Act of 25 *H.* 8, *cap.* 9. and all that which he uſurped before, was not as he was Archbiſhop, for as to that he was reſtrained by the Canons, but as he was *Legatus Natus*, which Authority is now taken away and aboliſhed utterly.

Archbiſhops were Legati nati, and had Legatine Power, which is now aboliſhed, vi. Linwood.

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Laſtly, If the ſaid Act of 25 *H.* 8. *cap.* 9. ſhould not be ſo expounded, Then the Act which is principally made (as it appeareth by the Preamble againſt the Courts of the Archbiſhopricks) ſhould be as to them illuſory; for if the Biſhop of *Canterbury*, in reſpect of his exempt Peculiar in *London*, may draw to him all the Dioceſe in *London*; ſo might he at *Newington* which is a Peculiar in *Wincheſter* Dioceſe, draw to him the whole Dioceſe of *Wincheſter*; and at *Totteridge* near *Barnet*, the whole Dioceſe of *Lincoln*, and ſo of the like.

Vi. lib. Arch. Cant. p. 39. that the Archbiſhop of Cant. hath a Peculiar in many Dioceſes. Gibſ. Cod. 417, & 1050.

3. It was reſolved, That when any Judges are prohibited by any Act of Parliament, that if they do proceed againſt the Act, there a Prohibition lieth. As againſt the Steward and Marſhal of the Houſhold. *Quod Seneſchallus & Mariſcallus non teneant Placit. de libero tenem. de Debito, de Conventione, &c.* So in the Statute of *Articuli ſuper chartas, cap.* 3. *Regiſter fol.* 185. *inter Brevia ſuper ſtatuta.* So againſt the Conſtable of the Caſtle of *Dover*: *Quod*

Quod non tangit Custodiam Castri. So to Justices of Assise upon the Statute *Quod Inquisitiones quæ sunt magnæ exactionis non capiantur in Patria.*

Also to the Treasurer and Barons of the Exchequer, upon the Statute *De Articul. super Cartas, cap.* 4. The Statute of *Rutland, cap. ultimo. Quod communia Placit. non teneantur in Scaccario.* All which, and many more, you may see in the *Register inter Brevia super Statuta.* See *F. N. B.* 45 & 56, *&c.* 17 *H.* 6. 54. *vi.* 13 *E.* 3. *to Prohibition*: A Prohibition to the Chancellor, and Diversity of Courts in the Title of Chancery. So against all Ecclesiastical Judges upon the Statute of 2 *H.* 5. *cap.* 3. If the Judges there will not give or deliver to the Party a Copy of the Libel, although that the Matter be meer Ecclesiastical: and therewith agreeth 4 *E.* 4. 37. and *F. N. B.* 43. *e.* So the Case upon the Statute of 2 *H.* 5. *cap.* 15. If the Ecclesiastical Judges in Case of Heresy, and other Matters of meer Spiritualty do not proceed according to the Intention of the same Statute; as it appeareth by the Precedent in 5 *E.* 4. *Keyson*'s Case, 10 *H.* 7. 17. See the Opinion of *Paston*, 9 *H.* 6. 3. A Man excommunicated by the Bishop of *London*, for a Crime done in another Diocese, shall not be grieved thereby; so as the Common Law takes Notice of the Canons, in such Case, as *Coram non Judice.* And although the Statute of 23 *H.* 8. inflicts a Penalty, yet a Prohibition lieth, for the Inflicting of the Penalty doth not take away the Prohibition of the Law: and therefore, *Cap.* which inflicts Punishment if the Sheriff doth not put his Name unto the Return; yet the same is Error if he doth not put to his Name. See 35 *H.* 66. when any thing is prohibited by a Statute, if the Party be convicted, he shall be fined for * the Contempt to the Law: and 19 *H.* 6. 4. agrees in Maintenance: And if every Person should be put to his Action upon the Statute, the same would be Cause of Suits and Vexation, and the shortest and more easy is to have a Prohibition: See the Statute of 21 *H.* 8. *cap.* 6. of *Mortuaries*, by which it is enacted, That no Parson, Vicar, Curate, *&c.* demand any *Mortuary* but in such Manner as is mentioned in the Act, upon Pain of Forfeiture of so much in Value as they take, more than is limited by the Act, and forty Shillings over to the Party grieved. Yet it appeareth by *Doctor and Student, lib.* 2. *cap.* 55. *fol.* 105. That if the Parson, *&c.* sueth for *Mortuaries* otherwise than the Act appointeth, that a Prohibition lieth; yet there is a Penalty added, which is an Authority expressly in the Point: And the Case at Bar is a more strong Case, and that for three Reasons.

1. If

Vi. Pasc. 42 El. Rot. 139. Rudd's Case, a Prohibition for citing out of the Diocese. Tr. 44 El. Rot. 1073. the like in an Information upon the Statute against Zachary Babington.

Vi. If any one in the Spiritual Court appeals contrary to the Statute of 24 H. 8. cap. 12. although the Matter be meer Spiritual, a Prohibition lieth. So upon the Statute of 2 H. 5. cap. 2.

Page [9] See 2 H. 4. 10. by Hawkford, and so affirmed by the Court, when one who hath not Authority, holdeth Plea in Spiritual Things, whereof the Jurisdiction doth not belong to him, yet no Consultation shall be granted, because a Consultation shall not be granted to one that hath not Power, &c.

1. It was made an Affirmance of the Canon Law.

2. It was made for the Eaſe of the People and Subjects, and for the Maintenance of the Juriſdiction of the Ordinary, ſo as the Subjects have Benefit by the Act; and therefore although that the King may diſpence with the Penalty, yet the Subject grieved ſhall have a Prohibition. And the Rule of the Court was, *Fiat Prohibitio Curiæ Cantuar. de Arcub. inter partes prædict per Curiam.* And *Sherley*, and *Harris* junior, Serjeants at Law, were of Counſel in the Caſe.

III. *Mich.* 6 Jac. *Regis.*

Edwards's *Caſe*.

High Commiſſion.
Poſt. 47.
12 Co. 19, 47, 76.
See Gibſon's Codex 36, 50, 54, 56, 58, &c. 219, 309, 396.

THE High Commiſſioners in Cauſes Eccleſiaſtical objected divers Articles in *Engliſh*, againſt *Thomas Edwards* dwelling in the City of *Exeter*.

1. That Mr. *John Walton*. hath been many Years trained up in Learning in the Univerſity of *Oxford*, and there worthily admitted to ſeveral Degrees of Schools, and deſervedly took upon him the Degree of Doctor of Phyſick.

2. That he was a Reverend, and well practiſed Man in the Art of Phyſick.

3. That you the ſaid *Thomas Edwards* are no graduate, *&c.*

4. That you knowing the Premiſſes, notwithſtanding you the ſaid *Edwards*, *&c.* of Purpoſe to diſgrace the ſaid Dr. *Walton*, and to blemiſh his Reputation, Learning and Skill, with Infamy and Reproach, did againſt the Rules of Charity write and ſend to the ſaid Mr. Doctor *Walton*, a lewd and ungodly, and uncharitable Letter, and therein taxed him of Want of Civility and Honeſty, and Want of Skill and Judgment in his Art and Profeſſion, *&c.* And you ſo far exceeded in your immoderate and uncivil Letter, that you told him therein in plain Terms, *He may be crowned for an Aſs*, as if he had no Manner of Skill in his Profeſſion, and were altogether unworthily admitted to the ſaid Degrees, and therein you purpoſely and adviſedly taxed the whole Univerſity of Raſhneſs and Indiſcretion for admitting him to that Degree without Sufficiency and Deſert.

5. And

5. And further to diſgrace the ſaid Mr. Doctor *Walton*, in the ſaid Univerſity, did publiſh a Copy of the ſaid Letter to Sir *William Courtney* and others, and in your Letter was contained, *Sipſilam lichenem mentegram*, Take that for your Inheritance, and thank God you have a good Father: And did not you thereby covertly * mean and imply, That the Father of the ſaid Dr. *Walton* (being late Biſhop of *Exeter*, and a Reverend Prelate of this Land) was ſubject to the Diſeaſes of the French Pox and Leproſy, to the Diſlike of the Dignity and Calling of Biſhops.

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6. That in another Letter you ſent to Mr. Doctor *Maders*, Doctor of Phyſick, you named Mr. Doctor *Walton*, and made a Horn in your Letter: And we require you upon your Oath to ſet down, whether you meant not that they were both Cuckolds, and what other Meaning you had.

7. You knowing that Dr. *Walton* was one of the High Commiſſion in the Dioceſe of *Exeter*, and having obtained a Sentence againſt him in the *Star-Chamber*, for contriving and publiſhing of a Libel, did triumphingly ſay, That you had gotten on the Hip a Commiſſioner for Cauſes Eccleſiaſtical in the Dioceſe of *Exeter*, which you did to vilify and diſgrace him, and in him the whole Commiſſion Eccleſiaſtical in thoſe Parts.

Laſtly, That after the Letter miſſive ſent unto you, you ſaid arrogantly, *That you cared not for any Thing that this Court can do unto you, nor for their Cenſure, for that you can remove this Matter at your Pleaſure.*

And this Term it was moved to have a Prohibition in this Caſe. And the Matter was well argued; And at laſt it was reſolved by *Coke* Chief Juſtice, *Warberton*, *Daniel*, and *Foſter* Juſtices, That the firſt ſix Articles were meerly Temporal concerning Doctor *Walton* in his Profeſſion of Phyſick, and ſo touched only the temporal Perſon, and a temporal Matter, and in Truth, it is in the Nature of an Action upon the Caſe for Scandal in his Profeſſion of Phyſick: And yet the Commiſſioners themſelves do proceed in the ſame *Ex Officio*. And it was reſolved, that as for them, a Prohibition doth lie for divers Cauſes.

1. Becauſe that the Matter and Perſons are Temporal.

2. Secondly, Becauſe it is for Defamation, which if any ſuch ſhall be for the ſame, it ought to begin before the Ordinary, becauſe it is not ſuch an enormous Offence which is to be determined by the High Commiſſioners: And for the ſame Reaſon Suit doth not lie before them, for

See Book of Entries 444. & 447. Non eſt Juri conſentaneum quod quis ſuper iis quorum cognitio ad nos pertinet in Curia Chriſtianitatis trahatur in placita. Vi. Chriſtianitatis dicuntur mere Spiritualia quia non habent mixturam Temporalem. vi. 22 E. 4. 1. Coolitis the Abbot of Sion's Caſe.

Stat. Circumſpecte agatis, An. 13 E. 1 Epiſcopus teneat placita in Curia de his quæ ſunt mere Spiritualia. Et vi. Lindwood, fol. 70. Lit.

calling

calling the Doctor Cuckold, as it was objected in the ſeventh Article: And it was ſaid, that the High Commiſſioners ought to incur the Danger of Premunire.

2. It was reſolved, That the Eccleſiaſtical Judge cannot examine any Man upon his Oath, upon the Intention and thought of his Heart, for *Cogitationis pœnam nemo emeret.* And in Caſes where a Man is to be examined upon his Oath, he ought to be examined upon Acts or Words, and not of the Intention and Thought of his Heart; and if every Man ſhould be examined upon his Oath, what Opinion he holdeth concerning any Point of Religion, he is not bound to anſwer the ſame; for in Time of Danger, *Quis modo tutus erit*, if every one ſhould be examined of his Thoughts. And ſo long as a Man doth not offend neither in Act nor in Word any Law eſtabliſhed, there is no Reaſon that he ſhould be examined upon his Thought or Cogitation: For as it hath been ſaid in the Proverb, *Thought is free*; And therefore for the ſixth and ſeventh Articles, they were reſolved as well for the Matter as for the Form in offering to examine the Defendant upon his Oath, of his Intention and Meaning, to be ſuch, to which the Defendant was not to be compelled to anſwer: *Ergo*, it was reſolved, that as to the Article, he might juſtify the ſame, becauſe as it appeareth upon his own Shewing, that * the Doctor was ſentenced in the *Star-Chamber*: Alſo the Libel is Matter meer Temporal, and if it were meer Spiritual, ſuch a Defamation is not examinable before the High Commiſſioners.

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As to the laſt Article, It appeareth now by the Judgment of this Court, that he might well juſtify the ſaid Words: Alſo the High Commiſſioners ſhall not have Conuſance of any Scandal to themſelves for that they are Parties; and ſuch Scandal is puniſhable by the Common Law, as it was reſolved in *Hale*'s Caſe, which ſee in the Book of the Lord *Dyer*'s *Reports*, and ſee in my Book of Precedents, the Copy of the Indictment of *Hales*, for ſcandalling of the Eccleſiaſtical Commiſſioners.

Judex non potest injuriam ſibi datam punire.

Vi. the Stat. of 23 H. 8. c. 9.

Note, The Biſhop of *Wincheſter* being Viſitor of the School of *Wincheſter* of the Foundation of *Wickham* Biſhop of *Wincheſter*; and the Biſhop of *Canterbury*, and other his Colleagues, *An.* 5 *Car.* cited the Uſher of the ſaid School, by Force of the ſaid Commiſſion to appear before them, and proceeded there againſt him, for which they incurred the Danger of a Premunire. And ſo did the Biſhop of *Canterbury* and his Colleagues, by Force of a High Commiſſion to them directed, cite one *Humphrey Frank* Maſter of Arts, and Schoolmaſter of the School of *Sevenock*,

(of

(of the Foundation of Sir *William Sevenock*, in the Time of King *Henry* the Sixth) to appear before the High Commissioners at *Lambeth* the sixth Day of *December* last past, which Citation was subscribed by Sir *John Bennet* Doctor of Law, Doctor *James*, and Doctor *Hickman*, three of the High Commissioners: And Sir *Christopher Perkins* procured the said Citation to be made, and when the said *Frank* appeared, the Archbishop being associated with Sir *Christopher Perkins*, and Doctor *Abbot* Dean of *Winchester*, made an Order concerning the said School, (*scil.*) That the said *Frank* shall continue in the same School until the Annunciation, and that he should have twenty Pounds paid to him by Sir *Ralph Bosoile* Knight, *who it seems was never cited; but* Quære, *If he was not Plaintiff.*

IV. *Mich.* 6 Jacobi *Regis.*

Taylor *and* Shoile's *Case.*

Brewer, a Trade within 5 Eliz. Indictments, &c. on the said Stat. See 1 Salk. 370, 373, 382. 5 Mod. 180. 2 Rol. Abr. 81. pl. 6. Cumb. 179, 212, 254, &c. 288.

TAylor informed upon the Statute 5 *Eliz. cap.* 4. *Tam pro Domino Reg. quam pro seipso* in the Exchequer, That the Defendant had exercised the Art and Mystery of a Brewer, *&c.* and averred that *Shoile* the Defendant did not use or exercise the Art or Mystery of a Brewer, at the Time of the Making the Act, nor had been Apprentice by seven Years at least, according to the said Act, *&c.* The Defendant did demur in Law upon the Information, and Judgment was given against him by the Barons of the Exchequer. And now in this Term upon a Writ of Error, the Matter was argued at *Serjeants Inn*, before the two Chief Justices, and two Matters were moved; The One, That a Brewer is not within the said Branch of the said Act: For the Words are, That it shall not be lawful to any Person or Persons, other than such as now lawfully use or exercise any Art or Mystery, or manual Occupation, to set up, use or exercise any Art, Mystery, or manual Occupation, except he shall have been brought up therein seven Years at the least, as an Apprentice. And it was said, That the Trade of a Brewer is not any Art, Mystery, or manual Occupation within the said Branch, because the same is easily and presently learned, and he * needs not to

have

have ſeven Years Apprenticeſhip to be inſtructed in the ſame, for every Houſewife in the Country can do the ſame: And the Act of *Henry* the Eighth is, That a Brewer is not a Handycraft Artificer.

2. It was moved, That the ſaid Averment was not ſufficient, for the Averment ought to be as general as the Exception in the Statute is, (*ſcil.*) That the Defendant did not uſe any Art, Myſtery, or Occupation at the Time of the Making the ſame Act; for by this Pretence if any Art, *&c.* then as a Taylor, Carpenter, *&c.* he may now exerciſe any other Art whatſoever.

As unto the firſt, It was reſolved, That the Trade of a Brewer, (*ſcil.*) to hold a common Brew-houſe, to ſell Beer or Ale to another, is an Art or Myſtery within the ſaid Act; for in the Beginning of the Act, It is enacted, That no Perſon ſhall be retained for leſs Time than a whole Year in any of the Services, Crafts, Myſteries, or Arts of Cloathing, *&c.* Bakers, Brewers, *&c.* Cooks, *&c.* So as by the Judgment of the ſame Parliament, The Trade of a Brewer is an Art and Myſtery; which Words are in the ſaid Branch upon which the ſaid Information is grounded: Alſo becauſe that every Houſewife brews for her private Uſe; ſo alſo ſhe bakes, and dreſſeth Meat: And yet none can hold a common Bake-houſe, or a Cook's Shop to ſell to others, unleſs that he hath been an Apprentice, *&c.* for they are expreſſly named alſo in the Act as Arts and Myſteries: And the Act of 22 *H.* 8. *cap.* 13. is explained, That a Brewer, Baker, Surgeon, and Scrivener Alien, are not Handicrafts mentioned within certain penal Laws: But the ſame doth not prove, but that they are Arts or Myſteries, for Art or Myſtery is more general than Handicrafts, for the ſame is reſtrained to Manufactures.

As to the ſecond Point, It was reſolved, That the Intention of the Act was, That none ſhould take upon him any *Art*, but he who hath Skill or Knowledge in the ſame: And therefore the Statute intendeth, That he who uſeth any Art or Myſtery at the Time of the Act, might uſe the ſame Art or Myſtery; for *Quod quiſque norit in hoc ſe exerceat*: And the Words of the Act are, *As now do lawfully uſe*, *&c.* And it was ſaid, That it was very neceſſary, that Brewers ſhould have Knowledge and Skill in Brewing good and wholeſome Beer and Ale, for that the ſame doth greatly conduce to Mens Healths: And ſo the firſt Judgment was affirmed.

V. *Mich.* 6 Jacobi *Regis.*

In the Common Pleas.

The Case of Modus Decimandi.

De non Decimando Silvæ cæduæ. Vide poſt. 23, 37, 58, &c. 12 Co. 63, 64. Watſon's Clergyman 546, 547, &c. Farteſl. 137.

SHerley Serjeant moved to have a Prohibition, becauſe that a Perſon ſued to have Tithes of *Silva Cædua* under twenty Years Growth in the *Weild of Kent*; where, by the Cuſtom of it, which is a great Part of the County, Tithes of any Wood was never paid. And if ſuch a Cuſtom *in non Decimando* for all Lay-people within the ſaid Weild, were lawful or not, was the Queſtion; and to have a Prohibition it was ſaid, That although one particular Man ſhall not preſcribe *in non Decimando*, yet ſuch a general Cuſtom within a great Country might well be, as in 43 *E.* 3. 32. and 45 *E.* 3. *Cuſtom* 15. It was preſented in the King's Bench, That an Abbot had purchaſed Tenements after the Statute, *&c.* And the Abbot came and ſaid, That he was Lord of the * Town, *&c.* And the Cuſtom of the Town was, That when the Tenant ceſſeth for two Years, that the Lord might enter until Agreement be made for the Arrearages; and that he who held theſe Tenements was his Tenant, and ceſſed for two Years, and he entred: And the Rule of the Court is, becauſe it was an Uſage only in that Town, and not in the Towns, that is, in the Country adjoining, he was put to anſwer. So as by the ſame it appeareth, that a *Cuſtom was not good in a particular Town* which perhaps might be good and of Force in a Country *&c.* See 40 *Aſſ.* 21. and 27. 39 *E.* 3. 2. A Cuſtom within a Town, that an Infant, *&c.* might alien, is not good; but yet ſuch a Cuſtom within *Kent* hath oftentimes been adjudged to be good. See 7 *H.* 6. 26. *b.* 16 *E.* 2. *Preſcription* 53. *Dyer* 363. 22 *H.* 6. 14. 21 *E.* 4. 15. and 45 *Aſſ.* See *Doctor and Student, lib.* 2. *cap.* 55. A particular Country may preſcribe to pay no Tithes for Corn, Hay, and other Things, but that is with this Caution, ſo as the Miniſter hath ſufficient Portion beſides to maintain him, to celebrate Divine Service: And *fol.* 172. it is holden, That where Tithes have not been paid of Under-woods under twenty Years Growth, that no Tithes ſhall be paid for the ſame

Ibid. 515, 516.

Page [13] Cuſtom de non Decimando, where good, or not. See Watſon's Clergyman 502, 503, 506, 526, 544, &c. 568, &c. Selden of Tithes, ch. 14. ſect. 2, 3, &c.

ſame, becauſe that they do not renew nor increaſe from Year to Year, ſo as they are not due to the Parſon but by Cuſtom. And he ſaith, *fol.* 174. That ſuch a Cuſtom of a whole Country, that no Tithes of a Lordſhip ſhall be paid, is good; and it is to be obſerved, that in all Libels for Tithes of Woods, they alledge a Preſcription to have Tithes of them: But the Court would adviſe, whether ſuch a Cuſtom for a Town or Country ſhould be good: But in antient Times, The Pariſhioners have given or procured to the Parſon a Wood or other Lands, *&c.* to have and to hold to him and his Succeſſors in Satisfaction of all Tithes of Wood in the ſame Pariſh; and the Parſon is now ſeiſed of the ſame Wood, and that without Queſtion is a good Diſcharge of his Tithes; and that in ſuch Caſe, if he ſueth for Tithes of Wood, a Prohibition lieth: And therefore it hath been ſaid now of late, That ſuch Opinions were new and without any Antiquity, unto the great Prejudice of the Church: I will cite you an antient Judgment many Years paſt, *Mich.* 25 *H.* 3. *Wilts. Rot.* 5. before the King at *Weſtminſter*. *Samſon Foliet* brought an Attaint upon a Prohibition, againſt *Thomas* Parſon of *Swynden*, becauſe he ſued him in the Spiritual Court for a Lay Fee of the ſaid *Samſon*, in *Draycot*, contrary to the King's Prohibition, *&c.* The Defendant pleaded; *Quod coram Judicibus Delegatis petiit de eodem Decimas fœni de quodam prato ipſius Samſonis in Walcot unde eſt in poſſeſſione per ſententiam Judicum ſuorum, & fuit antequam Prohibitio Dom. Regis ad eum pervenerit, & quod pratum prædict. eſt in Walcot unde ipſe eſt Perſona, & non in Draycot:* To which the ſaid *Samſon* replied and ſaid, *Quod anteceſſores ſui antiquitus dederunt Duas acras prati Eccleſiæ de Draycot pro decimis fœni quam prædict. Thomas modo petit in eadem prato, quas quidem duas acras prati eadem Eccleſia adhuc habet, & ſemper hucuſque habuit, unde videtur ei quod illud quod prædict. Thomas ultra petit, eſt de laico feodo ſuo, & dicit quod pratum illud in quo idem Thomas petit Decimas eſt in Draycot ſicut Breve dicit, & non in Walcot, & de hoc ponit ſe ſuper Patriam:* And the Jury found, *Quod prædict. Thomas Perſona de Swyndon ſecutus fuit placita in Curia Chriſtianitatis de Laico feodo prædict. Samſonis contra Prohibitionem Dom. Regis, petendo ab eo Decimas fœni de quodam prato ipſius Samſonis in Draycot unde Anteceſſores ſui antiquitus dederunt Eccleſiæ de Draycot duas acras prati pro Decima* fœni quam præd.* Page [14] *Thomas modo petit, & quas eadem Eccleſia adhuc habet & ſemper hucuſque habuit, &c. Et quod pratum prædict. in quo idem Thomas petiit Decimas eſt in Draycot, & non in*

Walcot, &c. Ideo consideratum est quod prædict. Thomas sit inde in misericord. & reddat præd. Samsoni 20 Marcas quas versus eum pro Damnis, &c. Which antient Judgment I have recited at large, because that the same agrees with the Rule and Reason of the Law continued until this Day: For Judgments or Precedents in the Time of *Ed.* 2. *E.* 1. *H.* 3. *John*, *R.* 1. and more antient are not Authorities or Precedents to be now followed, unless that they concur and agree with the Law, and common Experience and Practice at this Day; for many Acts of Parliaments (and some of them not extant) have changed the antient Laws in divers Cases: And Desuetude hath antiquated, and Time and Custom hath taken away divers others; so as the Rule is good, *Quod Judiciis posterioribus fides est adhibenda; Et a communi observantia non est recedendum.* There are two Points adjudged by the said Record.

Vide post. 15, 16. 46. Discharge of Tithes to be try'd at Common Law. See and Note the Introduction to Gibson's Codex 20, 21. Antea 4, &c. ib. 2 Co. 38, 44, to 48. 4 Co. 74. 5 Co. 9, 13, 15, &c.

1. That Satisfaction may be given in Discharge of Payment of Tithes; And if the Successor of the Parson enjoyeth the Thing given in Satisfaction of the Tithes, and sueth for Tithes in Kind, he shall have a Prohibition, because that he chargeth his Lay Fee with Tithes, which is discharged of them. By which it appeareth that Tithes may be discharged, and altogether taken away and extinct: And herewith agreeth the Register which is the most antient Book of the Law, *fol.* 38. *Rex, &c. tali Judici, &c. salutem. Monstravit nobis A. tenens quandam partem Manerii de D. quod licet E. nuper Dominus Manerii præd. per quoddam scriptum Indentat. dedisset & concessisset F. nuper Personæ Ecclesiæ de D. quatuor acras terræ cum pertin. in eodem Manerio habend. & tenend. eidem F. & successoribus suis Personæ Ecclesiæ præd. in perpetuum. Et idem F. per præd. scriptum de assensu & voluntate Episcopi Lincoln. Diœcesani loci præd. & J. tunc Patroni Ecclesiæ præd. concessit pro se & successoribus suis quod idem E. hæredes & assignati sui essent quieti de Decimis vitulorum, &c. in Manerio præd. pro præd. quatuor acris sibi datis, &c. Et tamen nunc Persona Ecclesiæ præd. tenens præd. quatuor acras terræ præd. præd. A. assignat. præd. E. super decimam hujusmodi vitulorum, &c. in eodem Manerio, sibi præsentand. trahit in placitum coram, &c. in Curia Christianitatis, &c. Et quia discussio hujusmodi Donationis de laico feodo in regno nostro in Curia nostra, & non alibi tractari & fieri debet, vobis prohibemus, Quod placitum aliquod super laicum feodum in Regno nostro non teneatis in Curia Christianitatis, nec quicquam in hac parte quod in enervationem dicti scripti aut Donationis, & concessionis præd. que in Curia nostra & non alibi tractari sicut præd. est cedere poterit attentetis, sive attentim faciatis quovismodo;* By which also

also it appeareth, That Tithes may be discharged, and that the Matter of Discharge ought to be determined by the Common Law, and not in the Spiritual Court: And it is to be observed, That in the said Judgment, nor in the Register any Averment is taken of the Value of the Thing given in Satisfaction of the Tithes. Also by the Act of *Circumspecte agatis* made 13 *E.* 1. it is said, *S. Rector petat versus parochianos oblationes, & decimas debitas, seu consuetas, &c.* which proves that there are Tithes due in Kind, and other Tithes due by Custom, as a *Modus Decimandi, &c.* And yet it is resolved in 19 *E.* 3. *Jurisdiction* 28. That the Ordinance of *Circumspecte agatis* is not a Statute; and that the Prelates made the same, and yet then, the Prelates acknowledged, * That there were Tithes due by Custom, which is a *Modus Decimandi.* By which it appeareth also, That Tithes by Custom may be altered into another Thing: So where a Man grants a Parcel of his Manor to a Parson in Fee to be quit of Tithes, and makes an Indenture, and the Parson with the Assent of the Ordinary (without the Patron) grants to him that he shall be quit of Tithes of his Manor for that Parcel of Land: Afterwards if he or his Assignee be sued in the Spiritual Court for Tithes of his Manor, he or his Assignee shall have a Prohibition upon that Deed. And if that Deed was made before Time of Memory, and he hath so continued to be quit of Tithes, he shall have a Prohibition upon that Deed, if he be sued for the Tithes of that Manor, or of any Parcel of the same upon that Matter shewed. See 8 *E.* 4. 14. *F. N. B.* 41. G. *Vide* 3 *E.* 3. 17. 16 *E.* 3. *t. Annuity* 24. 40 *E.* 3. 3. *b.* and *F. N. B.* 152. And therefore if the Lord of a Manor hath always holden his Manor discharged of Tithes, and the Parson had before Time of Memory, or in antient Times divers Lands in the same Parish, of the Gift of the Lord, of which the Parson is seised at this Day in Fee, in respect of which, the Parson nor any of his Predecessors ever had received any Tithes of the said Manor; if the Parson now sueth for Tithes of the Manor, the Owner of the Manor may shew that special Matter, and that the Parson and his Successors Time out of Mind have holden those Lands, *&c.* of the Gift of one who was Lord of the said Manor, in full Satisfaction of the Tithes of the said Manor; and the Proof that the Lord of the Manor gave the Lands, that Tithes should never be paid, at this Day is good Evidence to prove the Surmise of the Prohibition. And so of the like; and 19 *E.* 3. *t. Jurisdiction* 28. it is adjudged, That Title of Prescription, shall be determined in the King's Court: And therefore a *Modus*

Averment. Post. 38.

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Prescriptions to be adjudg'd in the King's Courts Vide 15, 16.

dus Decimandi which accrueth by Custom and Prescription in the King's Court. And it appeareth by the Statute of 7 *H.* 4. *c.* 6. That the Pope by his Bulls discharged divers from Payment of Tithes, against which the Act of Parliament was made; and by Stat. 31 *H.* 8. *c.* 13. That the Possessions of religious Persons given to the King, were discharged of Payment of Tithes in certain Cases: And by Statute 32 *H.* 8. *c.* 7. it is provided, That all and singular Persons shall divide, set out, yield, and pay all and singular Tithes and Offerings aforesaid, according to the lawful Customs and Usages of the Parishes and Places where such Tithes or Duties shall come, or immediately rise or be due: Provided always, and be it enacted, *That no Person or Persons shall be sued or otherwise compelled to pay any Manner of Tithes, for any Manors, Lands, Tenements, or Hereditaments, which by the Laws or Statutes of this Realm are discharged, or not chargeable with the Payment of any such Tithes:* And the Stat. 2 *E.* 6. *c.* 13. enacts, That every of the King's Subjects shall from henceforth justify, and truly, without Fraud or Guile, divide, set out, *&c.* all Manner of their predial Tithes in their proper Kind as they will rise and happen, in such Manner and Form as hath been of Right yielded and paid, within forty Years next before the Making of this Act, or of Right or Custom ought to be paid. So as it appeareth by this, that Tithe is due of Right, and by Custom: And also in the same Act there is a *Proviso* in these Words; Provided always and be it enacted, *That no Person shall be sued, or otherwise compelled to yield, give, or pay any Manner of Tithes for any Manors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Prescription, are not* **chargeable with the Payment of any such Tithes, or that he be discharged by any Composition real:* so as it appeareth by that Act, that one may be discharged from the Payment of Tithes five Manner of Ways.

Watson's Clergyman 528.

Ibid. 518, 519, 526, &c. 529.

Ibid. 578, 584, 609.

Ibid, 536, 560, 564, 571, 586, &c. 598, &c. 614, 623, 632, &c.

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See Watson 503, 512, &c. to 558.

1. By the Law of the Realm, that is, the Common Law; As Tithes shall not be paid of Coals, Quarries, Brick, Tiles, *&c. F. N. B.* 53. and *Register* 54. Nor of the after Pasture of a Meadow, *&c.* nor of Rakings, nor of Wood to make Pales, or Mounds, or Hedges, *&c.*

Ibid. 546, &c.

Ibid. 526, &c.

2. By the Statutes of the Realm: As by the Statute of 31 *H.* 8. *cap.* 13. the Statute of 45 *E.* 3. *&c.*

3. By the Privilege, as those of St. *John*'s of *Jerusalem* in *England*; The *Cistertians*, *Templars*, *&c.* as it appeareth by 10 *H.* 7. 277. *Dyer.*

Ibid. 502.

4. By Prescription, As by *Modus Decimandi*, or an annual Recompence in Satisfaction of them, as appeareth before by the Authorities aforesaid.

5. By

5. By real Compoſition, as appeareth by the ſaid Writ cited out of the Regiſter: And ſo you have one or two Examples (for many others which may be added) of theſe five Manners of Diſcharges of Tithes. And by them all it appeareth, That a Man may be diſcharged of the Payment of Tithes, as before it is ſaid: So as now it apparently appeareth by the Laws of *England*, both ancient and modern, That a Layman ought to preſcribe *in Modo decimandi*, but not in *non Decimando*; and that in Effect agrees with the Opinion of *Thomas Aquinas* in his *Secunda ſecundæ*, *Quæſt.* 86. *art. ultimo.* For there he ſaith, *Quod in veteri lege præceptum de ſolutione Decimarum, partim erat morali inditum ratione naturali quæ dictat quod iis qui divino cultui miniſtrant ad ſalutem totius populi neceſſaria victui debent miniſtr. juxta illud*, 1 Cor. 9. *Quis militat, &c.* Who goeth to War at his own Charges, *&c. Partim autem erat judiciale ex divina inſtitutione robur habens*, (*ſcil.*) *Quantum ad determinationem certæ partis.* And all that agrees with our Law; and he goeth further, *In tempore vero novæ Legis etiam eſt determinatio partis ſolvend' authoritate Eccleſiæ* (that is by their Canons) *Inſtituta ſecundum quandam humanitatem, ut ſcilicet non minus populus novæ legis miniſtris Novi Teſtamenti exhibeat, quam populus veteris legis miniſtris Veteris Teſtamenti exhibebat, præſertim cum miniſtri novæ legis ſunt majores dignitate, ut probat Apoſtolus*, 2 Cor. 3. *Sic ergo patet quod ad ſolutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data eſt miniſtris Eccleſiæ, partim vero ex inſtitutione Eccleſ. quantum ad determinationem decimæ partis.* See *Doctor and Student*, *lib.* 2. *cap.* 56. *fol.* 164. That the tenth Part is not due by the Law of God, nor by the Law of Nature, which he calleth the Law of Reaſon: And he citeth *John Gerſon*, who was a Doctor of Divinity, in a Treatiſe which he calleth *Regulæ morales* (*ſcil.*) *Solutio decimarum ſacerdotibus eſt de jure divino, quatenus inde ſuſtententur, ſed quoad tam hanc vel illam aſſignare aut in alios redditus commutare, poſitivi juris eſt.* And afterwards, *Non vocatur portio curatis debita propterea decima, eo quod eſt decima pars, imo eſt interdum viceſima aut triceſima.* And he holdeth, That a Portion is due by the Law of Nature, which is the Law of God, but it appertaineth to the Law of Man to aſſign *Hanc vel illam portionem*, as Neceſſity requireth for their Suſtenance. And further he ſaith, That Tithes may be exchanged into Lands, Annuity, or Rent,

See Selden of Tithes, ch. 14. ſect. 3. ib. 507.

Selden of Tithes, ch. 6, 7, 8, &c. Watſon 431, 505, 511, 8

Rent, which ſhall be ſufficient for the Miniſter, &c. And there he ſaith, That in *Italy*, and in other the Eaſt Countries, they pay no Tithes, but a certain Portion according to the Cuſtom, &c. And all this is true, if * not, that Tithes be diſcharged or changed by one of the ſaid five Ways: And foraſmuch as it appeareth by themſelves, that the tenth Part or Value was Part of the Judicial Law, and certainly the ſame doth not bind any Chriſtrian Commonwealth, but that the ſame may be altered by Reaſon of Time, Place, or other Conſideration, as it appeareth in all Puniſhments inflicted by the Judicial Law, they do not now bind any, for Felony is now puniſhed by Death, &c. which was not ſo by the Judicial Law, &c. Alſo foraſmuch as now it is confeſſed, that the tenth Part is now due, *ex inſtitutione Eccleſ.* that is to ſay, by their Canons, and it appeareth by the Statute of 25 *H.* 8. *cap.* 19. That all Canons, &c. made againſt the Prerogative of the King in his Laws, Statutes, or Cuſtoms of the Realm, are void, and that was but a declaratory Law; for no Statute or Cuſtom of the Realm can be taken away or abrogated by any Canon, &c. made out or within the Realm, but only by Act of Parliament; and that well appeareth by 10 *H.* 7. *f.* 17. *c.* 18. That there is a Canon or Conſtitution, That no Prieſt ought to be impleaded at the Common Law. And there *Brian* ſaith, that a grave Doctor of the Law once ſaid unto him, that Prieſts and Clerks might be ſued at the Common Law well enough; for he ſaid, that *Rex eſt perſona mixta*, and is *Perſona unita cum Sacerdotibus Statutis Eccleſiæ.* In which Caſe the King might maintain his Juriſdiction by Preſcription; by which it appeareth, that Preſcription doth prevail againſt expreſs Canons or Conſtitutions, and is not taken away by them, which proves that the Statute of 25 *H.* 8. was but a Declaration of the ancient Law before; And there is an expreſs Prohibition in *Numb.* 18. *Nihil aliud poſſidebunt, decimarum oblatione contenti quas in uſus eorum & neceſſaria ſeparavi*: Which was not Part of the Moral Law, or Law of Nature, but Part of the judicial: And therefore Men of the holy Church at this Day do poſſeſs Houſes, Lands and Tenements, and not Tithes only.

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Canons againſt the Prerogative Statutes, Cuſtom or Preſcription are void. Vide poſt. 47. 2 Inſt. 599, &c.

The ſecond Point which agrees with the Law at this Day, which was adjudged in the ſaid Record of 25 *H.* 3. is, That the Limits and Bounds of Towns and Pariſhes ſhall be tried by the Common Law, and not in the Spiritual Court; and in this the Law hath great Reaſon, for thereupon depends the Title of Inheritance

2d Point. Limits and Bounds of Pariſhes, &c. to be try'd by Common Law. Vide Fart. 63. Quære Gibſon's Codex 239, &c. 2 Inſt. 599.

ritance of the Lay-fee, whereof the Tithes were demanded for Fines, and Recoveries are the Common Assurances of Lay Inheritances; and if the Spiritual Court should try the Bounds of Towns, if they determine that my Land lieth in another Town than is contained in my Fine, Recovery, or other Assurance, I shall be in Danger to lose my Inheritance, and therewith agreeth 39 *E.* 3. 29. 5 *H.* 5, 10. 32 *E.* 4. t. *Consultation*, 3 *E.* 4. 12. 19 *H.* 6. 20. 50 *E.* 3. 20. and many other Precedents until this Day. And note, there is a Rule in Law, that when the Right of Tithes shall be tried in the Spiritual Court, and the Spiritual Court hath Jurisdiction thereof, that our Courts shall be ousted of the Jurisdiction. 35 *H.* 6. 47. 38 *H.* 6. 21. 2 *E.* 4. 15. 22 *E.* 4. 23. 38 *E.* 3. 36. 14 *H.* 7. 17. 13 *H.* 2. *Juriſd.* 19. but that is when Debate is between Parson and Vicar, or when all is in one Parish, but when they are in several Parishes, then this Court shall not be ousted of the Jurisdiction. See 12 *H.* 2. Tit. *Jurisdiction* 17. 13 *R.* 2. *ibid.* 19. 7 *H.* 4. 34. 14 *H.* 4. 17. 38 *E.* 3. 56. 42 *E.* 3. 12. And yet there is a Canon expressly against this, which see in *Linwood titulo de pœnis* 55. And so *fol.* 227, 228. amongst the Canons or Constitutions of *Boniface*, *Anno Dom.* 1277. And the Causes wherefore the Judges of the Common Law would not permit the Ecclesiastical Judges to try *Modum Decimandi*, being pleaded in their Court is, because that if the Recompence * which is to be given to the Parson, in Satisfaction of his Tithes doth not amount to the Value of the Tithes in Kind, they would overthrow the same: And that also appeareth by *Linwood* amongst the Constitutions *Simonis Mephum*, Tit. *de Decimis*, *cap. Quoniam propter*, *fo.* 139. 6. *verbo consuetudines*, *consuetudo ut non solvantur*, *aut minus plene solvantur Decimæ*, *non valet*, and *ibidem secundum alios*, *Quod in Decimis realibus*, *non valet consuetudo ut solvatur minus decima parte*, *sed in personalibus*, &c.

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Note this Difference; altho' that the Parties do admit the Jurisdiction of the Court, yet upon the Pleading, if the Right of the Tithes shall come in Debate, there this Court shall be ousted of the Jurisdiction, and the Spiritual Court shall have Jurisdiction: But when the Right of Tithes cometh in Debate, and the Spiritual Court cannot have Jurisdiction or Conusance of it; as where a Lay-man is Plaintiff as Farmor, or Defendant as Servant of the Parson, as a Lay-man Farmor cannot sue there, nor he who justifies as Servant cannot be sued in Trespass; but if the Suit be between Parson and Vicar, or Parson and Parson, and other Spiritual Persons, if the King's Court be ousted of the Jurisdiction after Severance of the ninth Part; yet the Libel ought to be for Subtraction of Tithes, for of that they have Jurisdiction. and not of Tithes severed from the nine Parts; for that shall be in Case of a Premunire, and it appertaineth to the Common Law. See 16 H. 2. in the Case of Mortuary. Vide Decretalia Sexti, lib. 3. Tit. de Decimis, cap. 1. fo. 130. Col. 4. Et summa Angelica, fo. 72.

And

And *ibidem Lit. M. verbo, integre, faciunt expresse contra opinionem quorundam Theologorum, qui dicunt sufficere aliquid dari pro Decima.* And that is the true Reason in both the said Cases, *scil. de Modo Decimandi, & de Limitibus Parochiarum, &c.* that they would not adjudge according to their Canons; and therefore a Prohibition lieth; and therewith agreeth 8 *E.* 4. 14. and the other Books aboveſaid, and infinite Precedents; and the rather after the Statute of 2 *E.* 6. *cap.* 13. And alſo the Cuſtoms of the Realm are Part of the Laws of the Realm, and therefore they ſhall be tried by the Common Law, as is aforeſaid. See 7 *Ed.* 6. *Dyer* 79. and 18 *Eliz. Dyer* 349. the Opinion of all the Juſtices.

VI. *Mich.* 6 Jac.

In the Exchequer.

Baron *and* Boys's *Case.*

Sur Stat. 2 E 6. cap. 14. of Ingroſſers. 1 Hawk. ch. 80. ſect. 1, 2, 3, 5. & ſect. 15, 16. 17, &c.

IN the Caſe between *Baron* and *Boys*, in an Information upon the Statute of 5 *E.* 6. *cap.* 14. of Ingroſſers, after Verdict it was found for the Informer, That the Defendant had ingroſſed Apples againſt the ſaid Act: The Barons of the Exchequer held clearly, That Apples were not within the ſaid Act, and gave Judgment againſt the Informer upon the Matter apparent to them, and cauſed the ſame to be entered in the Margent of the Record where the Judgment was given; and the Informer brought a Writ of Error in the Exchequer-chamber, and the only Queſtion was, Whether Apples were within the ſaid Act? The Letter of which is, *That whatſoever Perſon or Perſons, &c. ſhall ingroſs or get into his or their Hands, by Buying, Contracting, or Promiſe, taking (other than by Demiſe, Grant, or Leaſe of Land, or Tithe) any Corn growing in the Fields, or any other Corn or Grain,*

Grain, Butter, Cheese, Fish, or other dead Victual within the Realm of England, *to the Intent to sell the same again, shall be accepted, &c. an unlawful Ingrosser.* And although that the Statute of 2 *E.* 6. *cap.* 15. made against Sellers of Victual, which for their great Gain conspire, *&c.* numbereth Butchers, Brewers, Bakers, Cooks, Costermongers and Fruiterers, as Victuallers: Yet Apples are not dead Victuals within the Statute of 5 *E.* 6. for the Buyers and Sellers of Corn and other Victuals have divers Proviso's and Qualifications for them, as it appeareth by the said Act, but * Costermongers and Fruiterers have not any Proviso for them: Also, always after the said Act they have bought Apples and other Fruits by Ingross, and sold them again, and before this Time no Information was exhibited for them, no more than for Plumbs or other Fruit, which serveth more for Delicacy than for necessary Food. But the Statute of 5 *E.* 6. is to be intended of Things necessary and of common Use for the Sustenance of Man; and therefore the Words are *Corn, Grain, Butter, Cheese, or other dead Victual*; which is as much to say, as Victual of like Quality, that is, of like necessary and common Use: But the Statute of 2 *E.* 6. *cap.* 15. made against Conspiracies to enhance the Prices, was done and made by express Words, to extend it to Things which are more of Pleasure than of Profit: So it was said, That of those Fruits a Man cannot be a Forestaller within this Act of 5 *E.* 6. for in the same Branch the Words are, *any Merchandize, Victual, or any other Thing.* But this was not resolved by the Justices, because that the Information was conceived upon that Branch of the Statute concerning Ingrossers.

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VII. *Hill.*

VII. *Hill.* 27 Eliz.

In the Chancery.

Fine. Dower. See 2 Co. 74, 78. 6 Co. 79. 7 Co. 38, 40. St. 27 H. 8. c. 10. St. 4 H. 7. c. 24. St. 18 E. 1. de Modo levandi. 5 Co. 2. Part 38, 39. 2 Inſt. 511, &c.

Hillary Term, the 27 of *Eliz.* in the Chancery the Caſe was thus: One *Ninian Menvil* ſeiſed of certain Lands in Fee, took a Wife, and levied a Fine of the ſaid Lands with Proclamations, and afterwards was indicted and outlawed of High Treaſon, and died: The Conuſees convey the Lands to the Queen, who is now ſeiſed; the five Years paſs after the Death of the Husband: The Daughters and Heirs of the ſaid *Ninian* in a Writ of Error in the King's Bench, reverſe the ſaid Attainder, *M.* 26 and 27 *Eliz.* laſt paſt; and thereupon the Wife ſueth to the Queen, (who was ſeiſed of the ſaid Land as aforeſaid) by Petition containing all the ſpecial Matter, *ſcil.* the Fine with Proclamations, and the five Years paſſed after the Death of her Husband, the Attainder and the Reverſal of it; and her own Title, *ſcil.* her Marriage, and the Seiſin of her Husband before the Fine: And the Petition being endorſed by the Queen, *Fiat droit aux parties, &c.* the ſame was ſent into the Chancery, as the Manner is.

And in this Caſe divers Objections were made againſt the Demandant.

1. That the ſaid Fine with Proclamations ſhould bar the Wife of her Dower, and the Attainder of her Huſband ſhould not help her; for as long as the Attainder doth remain in Force, the ſame was a Bar alſo of her Dower, ſo as there was a double Bar to the Wife, viz. the Fine levied with Proclamations, and the five Years paſt after the Death of her Husband, and the Attainder of her Husband of his Treaſon. But admit that the Attainder of the Husband ſhall avail the Wife in ſome Manner, when the ſame is now reverſed in a Writ of Error, and now upon the Matter is in Judgment of Law, as if no Attainder had been: And againſt that a Man might plead, that there is no ſuch Record, becauſe that the firſt Record is reverſed, and utterly diſaffirmed and annihilated, and now by Relation made no Record *ab initio*, and

and therewith agreeth the Book of 4 *H.* 7. 11. for the Words of the Judgment in a Writ of Error are, *Quod Judicium prædict' & Errores prædict' & alias in Recordo, &c. revocetur & adnullatur, &c. & quod ipsa ad poſſeſſionem ſuam ſive ſeiſinam ſuam* (as the Caſe requireth) *tenementorum *ſuorum prædict' una cum exitibus & proficuis inde a tempore judicii prædict' reddit' percept' & ad omnia quæ occaſione Judicii illius amiſit reſtituatur.* By which it appeareth, that the firſt Judgment, which was originally imperfect and erroneous, is for the ſame Errors now adnulled and revoked *ab initio*; and the Party, againſt whom the Judgment was given, reſtored to his Poſſeſſion, and to all the mean Profits, from the Time of the erroneous Judgment given, until the Judgment in the Writ of Error, ſo as the Reverſal hath a Retroſpect to the firſt Judgment, as if no Judgment had been given: And therefore the Caſe in 4 *H.* 7. 10. *b.* the Caſe is, *A.* ſeiſed of Land in Fee, was attainted of High Treaſon, and the King granted the Land to *B.* and afterwards *A.* committed Treſpaſs upon the Land, and afterwards by Parliament *A.* was reſtored, and the Attainder made void, as if no Act had been; and ſhall be as available and ample to *A.* as if no Attainder had been: And afterwards *B.* bringeth Treſpaſs for the Treſpaſs Meſne; and it was adjudged in 10 *H.* 7. *fol.* 22. *b.* That the Action of Treſpaſs was not maintainable, becauſe that the Attainder was diſaffirmed and annulled *ab initio.* And in 4 *H.* 7. 10. it is holden, that after a Judgment reverſed in a Writ of Error, he who recovered the Land by erroneous Judgment ſhall not have an Action of Treſpaſs for a Treſpaſs Mean, which was ſaid, was all one with the principal Caſe in 4 *H.* 7. 10. and divers other Caſes were put upon the ſame Ground. Page [20]

It was ſecondly objected, That the Wife could not have a Petition, becauſe there was not any Office by which her Title of Dower was found, *ſcil.* her Marriage, the Seiſin of her Husband, and Death: For it was ſaid, That although ſhe was married, yet if her Husband was not ſeiſed after the Age that ſhe is dowable, ſhe ſhall not have Dower; as if a Man ſeiſed of Land in Fee, taketh to Wife a Woman of eight Years, and afterwards before her Age of nine Years, the Husband alieneth the Lands in Fee, and afterwards the Woman attaineth to the Age of nine Years, and the Husband dieth; it was ſaid, that the Woman ſhall not be endowed. And that the Title of him who ſueth by Petition ought to be found by Office, appeareth by the Books in 11 *H.* 4. 52. 29 *Aſſ.* 31. 9 *Aſſ.* 28. 46 *E.* 3. *bre.* 618. 9 *H.* 7. 24, *&c.*

As

Limitations.
Vide 2 Co. 93.
3 Co. 87.
8 Co. 72, 100.
9 Co. 140, &c.
10 Co. 49, 99.
Cumb. 70.
Fitz. 5, 12, &c.

As to the first Objection, it was resolved, That the Wife should be endowed, and that the Fine with Proclamations was not a Bar unto her, and yet it was resolved that the Act of 4 *H.* 7. *cap.* 24. shall bar a Woman of her Dower by a Fine levied by her Husband with Proclamations, if the Woman doth not bring her Writ of Dower within 5 Years after the Death of her Husband, as it was adjudged, *Hill.* 4 *H.* 8. *Rot.* 344. in the Common Pleas, and 5 *El. Dyer* 244. For by the Act, the Right and Title of a *Feme Covert* is saved, so that she take her Action within five Years after she becomes uncovert, *&c.* but it was resolved, That the Wife was not to be aided by that Saving: for in respect of the said Attainder of her Husband of Treason, she had not any Right of Dower at the Time of the Death of her Husband, nor can she after the Death of her Husband bring an Action, or prosecute an Action to recover her Dower, according to the Direction and Saving of the said Act: But it was resolved, That the Wife was to be aided by another former Saving in the same Act, *viz.* And saving to all other Persons (*scil.* who were not Parties to the Fine) such Actions, Right, Title, Claim and Interest in or to the said Lands, *&c.* as shall first grow, remain, descend, or come to them after the said Fine ingrossed, and Proclamations made, * by Force of any Gift in Tail, or by any other Cause or Matter had and made before the said Fine levied, so that they take their Actions and pursue their Right and Title according to the Law, within five Years next after such Action, Right, Claim, Title or Interest to them accrued, descended, fallen or come, *&c.* And in this Case the Action and Right of Dower accrued to the Wife after the Reversal of the Attainder, by Reason of a Title of Record before the Fine, by Reason of the Seisin in Fee (had) and the Marriage (made) before the Fine levied, according to the Intention and Meaning of the said Act.

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Relation.
See 3 Co. 29.
4 Co. 42.
Plow. 31, 260.
Moor 140.
Cro. El. 196, 789.

And as to the said Point of Relation, it was resolved, That sometimes by Construction of Law a Thing shall relate *ab initio* to some Intent, and to some Intent not; for *Relatio est fictio Juris*, to do a Thing which was and had Essence, to be adnulled *ab initio*, betwixt the same Parties to advance a Right, or *Ut res magis valeat quam pereat*: But the Law will never make such a Construction to advance a Wrong, which the Law abhorreth, or to defeat collateral Acts which are lawful, and principally if they do concern Strangers: And this appeareth in this Case (*scil.* when an erroneous Judgment is reversed by a Writ of Error: For true it is as it hath been said, That as unto the mean Profits, the same shall have Relation by Construction of Law, until

til the Time of the first Judgment given, and that is to favour Justice, and to advance the Right of him who hath wrong by the erroneous Judgment. But if a Stranger hath done a Trespass upon the Land in the mean Time, he who recovereth after the Reversal shall have an Action of Trespass against the Trespassors; and if the Defendant pleadeth that there is no such Record, the Plaintiff shall shew the special Matter, and shall maintain his Action, so as unto the Trespassors who are wrong Doers, the Law shall not make any Construction by way of Relation *ab initio* to excuse 'em, for then the Law by a Fiction and Construction should do wrong to him who recovereth by the first Judgment: And for the better apprehending of the Law on this Point, it is to know, That when any Man recovers any Possessions or Seisin of Land, in any Action by erroneous Judgment, and afterwards the Judgment is reversed as is said before, and upon that the Plaintiff in the Writ of Error shall have a Writ of Restitution, and that Writ recites the first Recovery, and the Reversal of it in the Writ of Error, is, that the Plaintiff in the Writ of Error shall be restored to his Possession and Seisin, *Una cum exitibus* thereof from the Time of the Judgment, &c. *Tibi præcipimus quod eundem A. ad plenariam seisinam tenementorum prædict' cum pertinentiis sine dilatione restitui facias, & per sacramentum proborum & legalium hominum de Com. suo diligenter inquiras ad quantum exitus & proficua tenementorum illorum cum pertinentiis a tempore falsi Judicii prædict' reddit. usque ad Oct. Sanct. Mich. anno, &c. quo die judicium illud per præfat. Justiciar. nostros revocat. fuit, se attingunt, juxta verum valorem eorundem, eadem exitus & proficua de terris & catallis prædict. B. in baliva tua fieri facias, & denarios inde præfato A. pro exitibus & proficuis tenementorum per eundem B. dicto medio tempore percept. sine dilatione haberi facias: Et qualiter hoc præceptum nostrum fuerit execut. constare facias, &c. in Octab. &c.* By which it appeareth, That the Plaintiff in the Writ of Error shall have Restitution against him who recovereth of all the mean Profits, without any regard by them taken; for the Plaintiff in the Writ of Error cannot have any Remedy against any Stranger, but only against him who is Party to the Writ of Error, and therefore the Words of the said Writ * command the Sheriff to enquire of the Issues and Profits generally, between the Reversal and the Judgment, with all which he who recovers shall be charged, and as the Law chargeth him with all the mean Profits, so the Law gives to him Remedy notwithstanding the Reversal against all Trespassors in the *Interim*, for otherwise the Law should

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make a Conſtruction by Relation to diſcharge them who are wrong Doers, and to charge him who recovers with the Whole, who peradventure hath good Right, and who entereth by the Judgment of the Law, which peradventure is reverſed for want of Form, or Negligence or Ignorance of a Clerk. And therefore as to that Purpoſe the Judgment ſhall not be reverſed *ab initio*, by a Fiction of Law, but as the Truth was, the ſame ſtands in Force until it was reverſed: And therefore the Plaintiff in the *Writ of Error* after the Reverſal ſhall have an Action of Treſpaſs for a Treſpaſs mean, becauſe he ſhall recover all the mean Profits againſt him who recovered, nor he that recovereth after ſhall be barred of his Action of Treſpaſs for a Treſpaſs mean, by Reaſon that his Recovery is reverſed, becauſe he ſhall anſwer for all the mean Profits to the Plaintiff in the *Writ of Error*: And therewith agreeth *Brian* Chief Juſtice, 4 *H.* 7. 12 *a.*

Note Reader, If you would underſtand the true Sence and Judgment of the Law, it is needful for you to know the true Entries of Judgments, and the Entries of all Proceedings in Law, and the Manner and the Matter of Writs of Execution of ſuch Judgments. See *Butler* and *Baker*'s Caſe, in the third Part of my *Reports*, good Matter concerning Relations. So as it was reſolved in the Caſe at Bar, although that to ſome Intent the Reverſal hath Relation, yet to bar the Wife of her Dower by Fiction of Law, by the Fine with Proclamations, and five Years paſt after the Death of her Husband, when in Truth ſhe had not Cauſe of Action, nor any Right or Title ſo long as the Attainder ſtood in Force, ſhould be to do wrong by a Fiction of Law, and to bar the Wife, who was a meer Stranger, and who had not any Means, to have any Relief until the Attainder was reverſed.

3 Co. 25, 26. &c. Pop. 87. Moor. Ca. 384.

And as unto the other Point or Objection, that the Demandant on the Petition ought to have an Office found for her, it was reſolved, that it needed not in this Caſe, becauſe that the Title of Dower ſtood with the *Queen*'s Title, and affirmed it; otherwiſe if the Title of the Demandant in the Petition had diſaffirmed the *Queen*'s Title; alſo in this Caſe, the *Queen* was not entitled by any Office that the Wife ſhould be driven to traverſe it, *&c.* for then ſhe ought to have had an Office to find her Title: But in Caſe of Dower, altho' that Office had been found for the *Queen* which doth not diſaffirm the Title in Dower, in ſuch Caſe the Wife ſhall have her Petition without Office, becauſe that Dower is favoured in Law, ſhe claiming but only for Term of Life, and affirming the Title of the Queen. See the *Sadler*'s Caſe in the 4th Part of my *Reports*.

And

And the Caſe which was put on the other Side was utterly denied by the Court, for it was reſolved, That if a Man ſeiſed of Lands in Fee, taketh a Wife of eight Years of Age, and alieneth his Lands, and afterwards the Wife attaineth to the Age of nine Years, and afterwards the Husband dieth, that the Wife ſhall be endowed: For altho' at the Time of the Alienation the Wife was not dowable, yet for as much as the Marriage, and Seiſin in Fee, was before the Alienation, and the Title of Dower is not conſummate until the Death of her Husband, ſo as now there was Marriage, Seiſin of Fee, Age of nine Years during * the Coverture, and the Death of the Husband, for that Cauſe ſhe ſhall be endowed: For it is not requiſite that the Marriage, Seiſin and Age concur together all at one Time, but it is ſufficient if they happen during the Coverture: So if a Man ſeiſed of Lands in Fee take a Wife, and afterwards ſhe elopes from her Husband, now ſhe is barrable of her Dower, if during the Elopement the Husband alieneth, and after the Wife is reconciled, the Wife ſhall be endowed: So if a Man hath Iſſue by his Wife, and the Iſſue dieth, and afterwards Land deſcendeth to the Wife, or the Wife purchaſeth Lands in Fee, and dieth without any other Iſſue, the Husband (for the Iſſue which he had before the Deſcent or Purchaſe) ſhall be Tenant by the Curteſy, for it is ſufficient if he have Iſſue, and that the Wife be ſeiſed during the Coverture, altho' that it be at ſeveral Times. But if a Man taketh an Alien to Wife, and afterwards he alieneth his Lands, and afterwards ſhe is made a Denizen, ſhe ſhall not be endowed, for ſhe was abſolutely diſabled by the Law, and by her Birth not capable of Dower, but her Capacity and Ability began only by her Denization; but in the other Caſe there was not any Incapacity or Diſability in the Perſon, but only a temporary Bar, until ſuch Age or Reconcilement, which being accompliſhed the temporary Bar ceaſeth: As if a Man ſeiſed of Lands in Fee, taketh a Wife, and afterwards the Wife is attainted of Felony, and afterwards the Husband alieneth, and afterwards the Wife is pardoned, and afterwards the Husband dieth, the Wife ſhall be endowed, for by her Birth ſhe was not uncapable, but was lawfully by her Marriage and Seiſin in Fee entitled to have Dower; and therefore when the Impediment is removed, ſhe ſhall be endowed.

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VIII. *Trin.* 44 Eliz.

In the King's Bench.

Sprat *and* Heal's *Caſe.*

Tithes ſubſtracted, Covin. Vid. ant. 12. Poſt. 37, 38, 48, &c. 5 Co. 2. Part. 67, 68. Watſ. 540, 555, 588, &c. 593, &c. 632, &c.

John Sprat libelled in the Spiritual Court againſt *Walter Heal* for Subſtraction of Tithes; the Defendant in the Spiritual Court pleaded, that he had divided the Tithes from the nine Parts: And then the Plaintiff made Addition to the Libel (in the Nature of a Replication) *ſcil.* That the Defendant divided the Tithes from the nine Parts, *quod prædict.* the Plaintiff *non fatetur, ſed prorſus diffitetur*; yet preſently after this pretended Diviſion *in fraudem legis*, he took and carried away the ſame Tithes, and converted them to his own Uſe; and the Plaintiff thereupon obtained Sentence in the Spiritual Court; and to recover the treble Value according to the Statute of 2 *E.* 6. *cap.* 13. And thereupon *Heal* made a Surmiſe, that he had divided his Tithes, and that the Plaintiff ought to ſue in the Spiritual Court for the double Value, and at the Common Law for the treble Value: And it was objected, That when the Owner of the Corn divides them, then they are become Lay-chattels, for the Taking of which an Action lieth at the Common Law: and therefore after Severance from the nine Parts, the Parſon ſhall not ſue for them in the Spiritual Court: But it was reſolved by the whole Court, That the ſaid Diviſion or Severance mentioned in the Libel, was not any Diviſion or Severance within the Statute of 2 *E.* 6. *cap.* 13. For the ſame Act provides, That every of the King's Subjects ſhall from henceforth truly and juſtly without Fraud * or Guile, di-

Page [24] vide, ſet out, yield, and pay all manner of other predial Tithes in their proper Land, ſo as when he divides them to the Purpoſe to carry them away, he doth not divide them juſtly and truly without Fraud or Guile, but here is Fraud and Guile, and no way a juſt Divi-

Diviſion, and therefore the ſame is out of the Statute for the Makers of the Statute reſpect *quo animo* he divides them (*ſcil.*) with a Mind and Intention that the Parſon carry them away, as in Right he ought, or with a Mind and Intention that he himſelf carry them away which he ought not, *Quia fraus & dolus alicui prodeſſe, aut ſimplicitas alicui obeſſe not debet*: And the ſame is *Crimen Stellionatum*, which we call *fraudem rem & impoſteram*: And where the Words of the Statute are, divide, ſet out, &c. their predial Tithes, &c. And if any Perſon carrieth away his Corn and Hay, and his and their predial Tithes, &c. And to make an Evaſion out of theſe Words, this Invention was deviſed; the Owner of the Corn by Covin ſold his Corn before Severance to another, who as Servant to the Vendee reaped the Corn, and carried away the Corn, without any Severance, pretending that neither the Vendee, becauſe he did not carry them away, nor the Vendor becauſe he had no Property in them, for he did not carry away his Corn, or his predial Tithes, ſhould be within that Statute: But it was reſolved, that the Vendor ſhould be charged in that Caſe with the Penalty of the Statute, for he carrieth them away, and his Fraud and Covin ſhould not help him or avail him. See 8 *E.* 3. 290. A real Action brought by a Man of Religion by Colluſion, although that he hath Right, yet he ſhall not have Execution, 9 *H.* 6. 41. A Recovery upon a good Title by Colluſion, ſhall not abate the Writ, 33 *H.* 6. 5. A Sale in open Market by Covin ſhall not bind the Property of a Stranger: But it was reſolved, that the Plaintiff could not ſue in the Spiritual Court for the treble Value, but for the double Value that he might. 2 Danv. 223. Poſt. 48.

IX. *Hill.* 6 Jacobi.

In the Common Pleas.

Neale *and* Rowſe's *Caſe.*

Extortion.
Stat. 21 H. 8. cap. 5.
See 10 Co. 101.
12 Co. 78.
1 Hawk ch. 68.
3 Inſt. 147, 149, 150.
See Sir John Bennet's Caſe.
4 Inſt. 336.

AT a *Niſi prius* in *London*, before my ſelf this Term, the Caſe was this: *Edward Neale* informed upon the Statute of 21 *H.* 8. *cap.* 5. which Plea begun *Mich.* 6 *Jac. Rot.* 1031. againſt *James Rowſe* Commiſſary and Official within the Archdeaconery of *Huntington*, within the Dioceſe of *Lincoln*, and having Probat of Wills and Teſtaments, &c. within the ſame Archdeaconery; and that *Nicholas Neale*, the third Year of the Reign of the King that now is, made his Teſtament and laſt Will in Writing, and made the Plaintiff his Executor, and died poſſeſſed of Goods and Chattels to the Value of a Hundred and fifty Pounds: The Defendant then Commiſſary and Official, &c. the Twenty third of *Febr.* 1605. at the Pariſh of St. *Mary Bow*, *Teſtament. prædict. probavit, inſinuavit, regiſtravit & ſigillavit; ac per manus cujuſdam Thomæ Nicke tunc miniſtri ipſius Jacobi Rowſe in ea parte deputat. & authorizat.* 14 *s.* 10 *d. pro probatione, inſinuatione & regiſtratione Teſtamenti prædict. de eodem Edwardo, &c. qui tam, &c. colore Officii ſui prædict. adtunc & ibidem extorſive recepit, & habuit contra formam ſtatuti prædict.* with this that the ſaid *Edward, qui tam, &c.* will add, That the Writing of the ſaid Teſtament according to the Rate of a Penny for every ten Lines of the ſaid Teſtament, every Line thereof containing * in length ten Inches, *non attingebat*, to the Sum of twelve Shillings four Pence, according to the Form of the Statute aforeſaid, &c. The Defendant pleaded *Nihil debet*, and at the *Niſi prius*, the Evidence of two Witneſſes was, That the Plaintiff cauſed the ſaid Teſtament which was in Paper, to be ingroſſed in Parchment; and the Plaintiff offered both to the ſaid *Rowſe*, the Official, to be proved; and he anſwered, That he would prove it, if his Fees ſhall be paid to him, and the Plaintiff asked him what were his Fees, and he wrote them in a Paper, which amounted to fourteen Shillings

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ten

ten Pence for the Probat, Inſinuation, Regiſtring and Sealing: And thereupon the Plaintiff laid upon the Table 20*s.* and deſired him to take as much as was due to him, and all that was in the Houſe of the Official; but he would receive nothing there, but appointed the Plaintiff to come in Court, where he would receive his Fees, and accordingly the Plaintiff came to him in Court, and prayed to have the ſaid Will proved; and the Defendant required the ſaid *Nicke* his Miniſter, to take of him for the Probation, Inſinuation, Regiſtring and Sealing, 14*s.* 10*d.* and thereupon he put the Seal of his Office to the ſaid Parchment ingroſſed, which the Plaintiff brought with him, and which he delivered to the Defendant. And it was objected, That this Caſe was out of the ſaid Statute, for thereby as to this Purpoſe, it is provided, *viz.* And where the Goods of the Teſtator, *&c.* amount above the Value of 40 *l.* That then the Biſhop, nor Ordinary by him or themſelves, nor any of his or their Regiſters, Scribes, Praiſers, Summoners, Apparators, or any other their Miniſters, for the Probation, Inſinuation and Approbation of any Teſtament or Teſtaments, *&c.* for the Regiſtring, Sealing, Writing, Praiſing, Making of Inventories, making Acquittances, Fines, or any Thing concerning the ſame Probat of Teſtaments, ſhall take or cauſe to be taken of any Perſon or Perſons, but only five Shillings, and not above, whereof to the Biſhop, Ordinary, *&c.* for him and his Miniſters 2 *s.* 6 *d.* and not above, and 2 *s.* 6 *d.* to the Scribe for Regiſtring of the ſame, *&c.* And it was objected by the Counſel of the Defendant, that the Defendant did not take the 14*s.* 10*d.* for the Probation, Inſinuation, Regiſtring or Sealing of the Teſtament, for no Probat was written upon the Teſtament it ſelf, nor any Seal put to it, but the Teſtament was ingroſſed in Parchment, and the Probat and Seal put to the Tranſcript ingroſſed, and not to the Teſtament it ſelf, and ſo out of the Statute; and the Statute extends only, when the Probat and Seal is put to the Teſtament it ſelf, and for the Ingroſſing of it after the Probat, no certain Fee is provided by the Statute; but for the Regiſtring of it after it is proved, there is an expreſs Fee in the Statute: But I conceived that the ſaid Taking the 14*s.* 10*d.* in the Caſe at Bar, was directly againſt the Statute. For the Act is in the Negative, and if the Executor requireth the Teſtament to be ingroſſed in Parchment, he ought to agree with him whom he requireth to do it, as he may: But the Ordinary, Official, *&c.* ought not to exact any Fee for the ſame of the Party as a Thing due to him, for divers Cauſes.

1. Becauſe the Words of the Act are expreſſed, for the Probation, *&c.* and for the Regiſtring, Sealing, Writing, praiſing, making of Inventories, Fines, giving of Acquittances, *&c.* which Word (*Writing*) extends expreſly to this Caſe.

Page [26] * 2. The Words are, or any Thing concerning the ſame Probat, and when the Seal and Probat is put to the Tranſcript, the ſame without Queſtion concerns the Probat, for the Probat is not to put any Writing but only to that, therefore the ſame concerns the Probat.

3. Such a Conſtruction ſhould make the Act idle and vain, for if the Ordinary, Official, *&c.* might take as much as he pleaſeth for the Ingroſſing done by his Miniſters as a Fee due to him, all the Purview of the Statute which is penned ſo preciſely concerning Perſons, *ſcil.* Biſhops, Ordinaries, and all Perſons who have Power to prove Wills and Teſtaments, Regiſters, Scribes, Summoners, Apparators, or any other the Miniſters, as for the Thing it ſelf, *ſcil.* the Probation, Inſinuation, Approbation, Regiſtring, Sealing, Writing, Praiſing, making of Inventories, Fines, giving of Acquittances, or any other Thing concerning the ſame, ſhould be all in vain, by that Evaſion of tranſcribing of it, as well againſt the expreſs Letter of the Act as the Intention and Moving of it: Alſo the Statute ſaith 5 *s.* and not above, ſo as the Manner of preciſe penning of it excludes all nice Evaſions; And the Act ought to be expounded to ſuppreſs Extorſion, which is a great Affliction, and impoveriſhing of the Poor Subjects.

4. As this Caſe is, he annexeth the Probat and Seal to the Tranſcript ingroſſed, which the Plaintiff brought with him and offered to the Defendant; ſo as the Caſe at Bar was without Queſtion, and generally the Ordinary, Official, *&c.* cannot exact or take any Fee for any Thing which concerns the Probat of a Will or Teſtament, but that which the Statute limits: And afterwards the Jury found for the Plaintiff, and of ſuch Opinion was *Walmſley*, *Warberton*, *Daniel* and *Foſter* Juſtices, the next Term in all Things, but upon Exception in Arreſt of Judgment for not purſuing of the Act, in the Information, Judgment is not yet given, *&c.*

X. *Hill. Anno* 6 Jac. *Regis.*

In the Common Pleas.

Nota, that in this Term a Queſtion was moved to the Court, which was this: If Tenant in Burgage ſhould pay Aid unto the King to make his eldeſt Son Knight. And the Point reſts upon this, If the Tenure in Burgage be a Tenure in Socage; for by the antient Common Law every Tenant in Knights Service, and every Tenant in Socage, was to give to his Lord a reaſonable Aid, to make his eldeſt Son a Knight, and to marry his eldeſt Daughter, and that was incertain at the Common Law, and alſo incertain when the ſame ſhould be paid. And this appeareth by *Glanvil, Lib.* 9. *cap.* 8. *fol.* 70. who wrote in the Time of *Henry* the Second, *Nihil autem certum ſtatutum eſt de hujuſmodi auxiliis dandis, vel exigendis, &c. ſunt alii præterea Caſus in quibus licet Dominis auxilia ſolvenda ſunt certa forma præſcripta ab hominibus ſuis ut filius ſuus & hæres fiat miles, vel ſi primogenitam ſuam filiam maritaverit, &c.* And in the Beginning of the Chapter, it is called *Rationabile Auxilium*, becauſe then it was not certain, but to be moderated by Reaſon in Reſpect of Circumſtances: And by the Preamble of the Statute of *Weſtm.* 1. *Anno* 3 *E.* 1. *cap.* 35. where it is ſaid, Foraſmuch as before that Time reaſonable Aid to make one's Son Knight, or to marry his Daughter, was never put in certain, * nor when the ſame ought to be paid, nor how much be taken; the ſaid Act put the ſaid two Incertainties to a Certainty, 1. That for a whole Knight's Fee there be taken but 20*s.* and of 20 *l.* Lands holden in Socage 20*s.* and of more, more, and of leſs, leſs, according to the Rate, by which the Aid it ſelf was made certain. 2. That none might levy ſuch Aid, to make his Son a Knight, until his Son be of the Age of fifteen Years; nor to marry his Daughter, until ſhe be of the Age of ſeven Years. And *Fleta*, who wrote after the ſaid Act, calls them *Rationabilia auxilia ad filium militem faciendum, vel ad filiam primogenitam maritandum:* And by the Statute of 25 *E.* 1. where it is provided, That no Taxes ſhall be taken but by common Conſent of the Realm, there is an Exception of the antient Aids, &c. which is to

Aid to make the King's eldeſt Son Knight. Vide poſt. 28.

Vide F. N. B. 82. ac.

See the Statute of 27 H. 8. cap. 10. of Uſes in the Preamble, concerning Aids, to make the eldeſt Son Knight, and to marry the Daughter.

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be intended of these Aids due unto the King by the antient Common Law: But notwithstanding the said Act of *Westm.* 1. it was doubted, whether the King, because he is not expressly named, were bound by it; and therefore in the twentieth Year of *E.* 3. the King took an Aid of 40 *s.* of every Knight's Fee for to make the Black Prince Knight, and nothing then of Lands holden in Socage; and to take away all Question concerning the same, the same was confirmed to him in Parliament: And afterwards, *Anno* 25 *E.* 3, *cap.* 11. it is enacted, That reasonable Aid to make the King's eldest Knight, and to marry his eldest Daughter, shall be demanded and levied after the Form of the Statute made thereof, and not in other Manner; that is to say, Of every Fee holden of the King without Mean 20 *s.* and no more, and of every 20 *l.* Land holden of the King without Mean in Socage 20 *s.* and no more. Now *Littleton*, *lib.* 2, *cap.* 10. *fol.* 36. *b.* Burgage-Tenure is, where an antient Borough is, of which the King is Lord; and those who have Tenements within the Borough, hold of the King their Tenements, that every Tenant for his Tenement ought to pay to the King a certain Rent: And such Tenure is but Tenure in Socage; and all Socage-Land is contributary to Aid, and therefore a Tenant in Burgage shall be contributary to it.

Vide Paulum Manutium De senatu Romano, pag. 9. of Aids instituted by Romulus, ad redimendum Corpus Domini, & ad filias collocandas, &c. per Clientes erga Patronos.

Burgage-Tenure, quid.

And it is to be observed, and so it appeareth in the Register, *fol.* 1, & 2. That in a *Writ of Right*, if the Lands or Tenements are holden by Knights Service, it is said, *Quas clamat tenere de te per servitium unius feodi Militis*; And if the Lands be holden in Socage, the Writ is, *Quas clamat tenere de te per liberum servitium unius libre cumini*, &c. so as Socage-Tenure in all Writs is called *Liberum servitium*. And by the Writ of Aid, *Fitz. N. B.* 81, it is commanded to the Sheriff, *Quod juste*, &c. *facias habere A. rationabile Auxilium de Militibus*, & *liberis tenentibus suis in Baliva tua*, &c. so as the same Writ makes a Distinction of Knights Service by the Name of *Militibus*, and of Socage by the Name of *Liberis tenentibus*. And in the Register, *fol.* 2. 6. the Writ of Right for a House in *London* (which is holden of the King in Burgage) is in these Words, *Rex*, *Majori*, *vel Custodi & Vicecom.* London: *Præcipimus vobis quod sine dilatione teneatis G. de uno Messuagio*, &c. *in* London, *quæ clamat tenere de nobis per liberum servitium*, &c. which proves, That Tenure in Burgage is a Tenure in Socage: But it appeareth by the Books of *Avowry* 26. and 10 *H.* 6. so *Ancient Demesne* 11. it was resolved by all the Justices in the Exchequer-Chamber, That no Tenure should pay for a reasonable Aid to marry the

the Daughter, or to make the Son a Knight, but Tenure by Knights Service, and Tenure by Socage; but not Tenure by Grand Serjeanty, nor no other: And 13 *H.* 4. 34. agrees to the Case of Grand * Serjeanty: And by the said Books it appeareth, that Tenure by Frankalmoign, and Tenure by Divine Service, shall not pay, for they are none of them: But Tenure in Burgage is a Tenure in Socage; and therefore the said Books prove, that such a Tenure shall pay Aid. And I conceive, that Tenure by Petit Serjeanty shall pay also Aid: For *Litt. lib.* 2. *cap.* 8. *fol.* 36. says, that such a Tenure is but Socage in Effect: But *Fitz. N. B.* 83. A. avoucheth, 13 *H.* 4. 34. That Tenant by Petit Serjeanty shall not pay Aid; but the Book only extends to Grand Serjeanty: If the Houses in a City or Borough are holden of the King in Burgage, and the King grant the Seigniories to one, and the City or Borough to another to hold of him, then those Houses shall not be contributary to Aid, for they are not immediately holden of the King, as is required by the Law. *Page* [28]

And I conceive that he who holdeth a Rent of the King by Knights Service, or in Socage, shall pay Aid; for the Words of the Act of *Westm.* 1. *cap.* 36. are, From henceforth of a whole Knights Fee only be taken 20 *s.* of 20 *l.* Land holden in Socage 20 *s.* and the Mean is said in Supposition of Law to hold the Land: And it is not Reason that the Tenant by Feoffment before the Statute should prejudice the Lord of his Benefit. And although it was said, that a Tenure in Socage, is *servitium Socæ*, as *Littleton* saith, and the same cannot be applied to Houses: To that it was answered, That the Land upon which the House is built, or if the House falleth down, may be made arable, and be ploughed. And a Rent may be holden in Socage, and yet it is not subject to be ploughed, but by a Possibility afterwards escheat to the Lord of the Land. See *Huntington*, *Polydor Virgil*, and *Hollinshed*'s *Chronicle*, fol. 35. 15 *H.* 4. Aid was levied by *Hen.* 2. to marry *Maud* his eldest Daughter to the Emperor, *viz.* 3 *l.* of every Hide of Land, *&c.* And see *The Grand Customary of Normandy*, *cap.* 35. there is a Chapter of Aids, whereof the first is, to make the eldest Son of his Lord a Knight; and the Second to marry his eldest Daughter. And see a Statute made in *anno* 19 *H.* 7. which beginneth thus, *Item præfati Communes in Parliamento prædicto existentes ex assensu dominorum Spiritualium & Temporalium in dicto Parliamento similiter existen. concesserunt præfato Regi quandam pecuniæ summam in loco duorum rationabilium auxiliorum suæ Majestati de jure debit. tam ratione creationis*

1 Inst. 162. b, 2 Inst. 231, 232, &c. 11 Co. 44.

tionis nobiliſſimi filii ſui primogeniti bonæ memoriæ, Domini Arthuri nuper Principis Walliæ, quam ratione Matrimonii & traductionis nobiliſſimi Principis Margaritæ filiæ ſuæ primogenit. quam etiam multiplicare pro Regni ſui perpetua pace & tranquillitate, &c. certis viis & modis levand. cujus quidem conceſſionis Tenor, &c. ſequitur in hæc verba: For as much as the King our Sovereign Lord is rightfully intitled to have two reaſonable Aids according to the Laws of this Land, the one for the making Knight the Right Honourable his firſt begotten Son *Arthur*, late Prince of *Wales* deceaſed, and the other, for the Marriage of the Right Noble Princeſs his firſt begotten Daughter *Margaret*, now married to the King of *Scots:* And alſo that his Highneſs hath born great and ineſtimable Charges for the Defence of the Realm, *&c.* conſidering the Premiſſes; and if the ſame Aids ſhould be levied, and had by Reaſon of their Tenures according to the antient Laws of the Land, ſhould be to them doubtful and uncertain, and great Unquietneſs, for the Search and not Knowledge of their ſeveral Tenures, and their Lands chargeable to the ſame, have made humble Petition unto his Highneſs, graciouſly to accept and take of them the Sum of 40000 *l.* * as well in Recompence and Satisfaction of the ſaid two Aids, as for the ſaid great and ineſtimable Charges, *&c.* as is aforeſaid. The King, to eſchew and avoid the great Vexation, Troubles and Unquietneſs which to them ſhould have enſued, if the ſaid Aids were levied after the antient Laws: And for the good and acceptable Services of the Nobles of this Realm, and other his faithful Subjects, in their own Perſons and otherwiſe, done to his Grace, and thereby ſuſtained manifold Coſts and Charges, to his great Honour and Pleaſure, doth pardon the ſaid two Aids, and accepteth the Offer aforeſaid: And that the pooreſt of his ſaid Commons ſhould not be contributary to the ſaid Sum of 40000 *l.* hath pardoned 10000 *l.* Parcel thereof, and doth accept of 30000 *l.* in full Satisfaction, *&c.* And that the Cities and Boroughs, Towns and Places, being in every Shire not by themſelves accountable in the Exchequer for Fifteens and Tenths, be chargeable with the Shires, *&c.* And all Cities and Boroughs, not contributary, *&c.* but accountable by themſelves, *&c.* ſhall be chargeable by themſelves towards the Payment of the ſaid 30000 *l.* with ſuch Sums as under the Act particularly appear, *&c.* And there under the Act appear the ſeveral Taxations of every ſeveral County, City, Borough, *&c.* and that the City of *London* is taxed to 618 *l.* 3 *s.* 5 *d.* the City of *Norwich* to 8 *l.* 6 *s.* 11 *d.* the City of *Canterbury* to 53 *l.* 13 *s.* 3 *d. ob.* *Nor* *ſol*

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Note. See Mr. Madox's Firma Burgi. cap. 7.

folk 286 *l.* 6 *s.* 10 *d.* *Suffolk* 1214 *l.* 5 *s.* 4 *d. ob. &c.* The Sum of all the Sums then expreſſed is 31648 *l.* whereof allowable for Fees and Wages of Commiſſioners and Collectors 651 *l.* 16 *s.* 2 *d.* and ſo remaineth 31006 *l.* 4 *s.* and 10 *d.* Note, that the Univerſities of *Cambridge* and *Oxford*, and the College of *Eaton* be excepted.

See *Rot.* 30 *H.* 3. *ex parte reman. Dom. Theſaur. in Scaccario, in auxilio nobis conceſſ. ad primogenitam filiam noſtram maritand'.* And note, that King *Henry* the Third had Aid granted to him in Parliament *ad Iſabellam ſororem ſuam Imperatori maritand.* but that was of Benevolence.

Benevolence. See 12 Co. 119, 120.

Rot. 42 *H.* 3. *ibid.* 6. *Monſtrat R. Johannes le Francois Baro de Scaccario, quod cum Dominus Rex non caperet niſi* 20 *s. de integro feodo militis de auxilio ad primogenitam filiam ſuam maritand. Radol. fil. Rad. fil. Mich. injuſte exegit de eodem* 30 *s. ad primogenitam filiam ſuam maritand. pro duabus partibus unius feodi militis, & averia ſua cepit, & ea detinet. Et ideo mandatum eſt Vic. Com. Bedd. & Buck. quod venire faciant, &c. prædict. R. ad reſpondendum eidem Johanni de prædict. tranſgreſſione, & prædict. averio, &c.* So as it appeareth by this, that ſome held, that the Statute of *Weſtm.* 1. aforeſaid was but a Confirmation of the Common Law, and that the King alſo ought not to take more: But that was doubted.

Ibid. in Regno 2 *E.* 1. *Rot.* 3. *de auxilio ad militiam,* (which is meant of Knight of the King's Son) in the Time of *Henry* the Third, & *Iſabella Comitiſſa Albermarle, perdonata* 116 *l.* 8 *s.* 7 *d. pro eodem auxilio, quia Boldwinus de Inſula frater ejus cujus hæres ipſa eſt fuit infra ætatem, & in cuſtodia ejus: & quia tenentes dictæ Iſabellæ onerentur per ſervitium militare de prædict. pecuniis.* Note, that that was before the Statute of *Weſtm.* 1. and by that it appeareth, That if one within Age be in Ward of the King, he ſhall not be contributary to Aid, but his Tenants which hold of him (and then held of the King by Reaſon of Ward) ſhall pay Aid unto the King, as it appeareth by that Record.

Ibid. 30 *E.* 1. *Rex dilectis & fidelibus, Vic. Kanc. &* [illegible]*ico. de R.* * *ſalutem. Sciatis, quod in primo die Junii* [illegible]*mo Regni noſtri* 18. *Prælati, Comites, Barones, & cæteri Magnates, de regno noſtro conceditur, pro ſe & tota communitate ejuſdem Regni in pleno Parliamento noſtro, nobis* [illegible]*nceſſerunt* 40 *s. de ſingulis feodis militum in dicto Regno ad auxilium ad primogenitam filiam noſtram maritand. levandos, ſicut hujuſmodi auxilium alias in caſu conſimil. levari conſuevit, cui quidem levationi faciend. pro dicta com-*

Page [30] Note, that this double Charge was in reſpect that they were diſcharged of any Contribution for Socage, which I conceive was for the Difficulty to find the Socage Tenure.

communitatis easiamento hucusque supersedimus faciend. gratiose assignavimus vos ad praedictum auxilium, &c. Note that his eldest Daughter was married to the *Earl of Bar.*

Ibid. T. R. 34 *E.* 1. *De auxilio concesso ad militiam filii Regis.*

Ibid. Hill. 4 *H.* 4. *Rot.* 19. *De rationabili auxilio de Will. Domino Roos,* for the Marriage of *Blanch* the King's eldest Daughter, out of the Manor of *Wragby* in the County of *Lincoln:* The like *M. Rot.* 5 *H.* 4. *Rot.* 33. *Lincoln.* and *Rot.* 34. *Lincoln.* and *Rot.* 35. *Lincoln.* and *Tr. R.* 5 *H.* 4. *Rot.* 2. *Kanc.* and *Rot.* 3. *Kanc.* and *Rot.* 5. *Kanc.*

See *ibid. P. R.* 21 *E.* 3. *Rot. Cantab. de auxilio ad filium Regis primogenitum milit. faciend. per Episcopum Eliensem:* By which it appeareth, that a Bishop for his Lands which he holdeth by Knights Service, or Socage, shall pay Aid: But those who hold by Frankalmoign, or by Divine Service, shall not pay Aid, as before is said.

See *ibid.* 20 *E.* 3. *Rot.* 13 and 14. *de auxiliando ad primogenitum filium Regis militem faciend.* and Collector thereupon appointed. By all which before cited, it appeareth, that Tenure in Burgage is subject to the Payment of Aid. And note, that a great Part of *London* was Abbey or Chauntry Land, and the Lands of Persons attainted. And all those which are immediately holden of the King by Knights Service, or in Socage, shall be contributary to the Payment of Aid, *&c.*

XI. *Hill.* 6 Jacobi *Regis.*

Prohibitions.

President of York. See 4 Inst. 242, 245. 12 Co. 48, 50, 52.

UPON Wednesday, being *Ashwednesday,* the D of *February,* 1606. A great Complaint was made b the President of *York* unto the King, That the Judges the Common Law had, in Contempt of the Command the King the last Term, granted sixty or fifty Prohibitio at the least out, of the Common Pleas to the President a Council of *York* after the sixth Day of *February,* and n med three in particular, (*scil.*) one between *Bell* a *Thawptes,* another between *Snell* and *Huet,* and anoth

in an Information of a riotous Reſcue preferred by Engliſh Bill by the Attorney General againſt *Chriſtopher Dickenſon*, one of the Sheriffs of *York*, and divers others, in reſcuing of one *William Watſon* out of the Cuſtody of the Deputy of one of the Purſuivants of the ſame Counſel who had arreſted the ſaid *Watſon* by Force of a Commiſſion of Rebellion awarded by the Preſident and Counſel, which Prohibition in the ſaid Information was (as was affirmed) denied upon a Motion made in the King's Bench the laſt Term, and yet granted by us. And the King ſent for me to anſwer to that Complaint: And I only, all the reſt of the Juſtices being abſent, waited upon the King in the Chamber near the Gallery; who, in the Preſence of *Egerton* Lord Chancellor, the Earl of *Salisbury* Lord Treaſurer, the Lord of *Northampton* Lord Privy Seal, the Earl of *Suffolk* Lord Chamberlain, the Earl of *Worceſter*, the Archbiſhop of *Canterbury*, the Lord *Wotton*, and others of his Counſel, rehearſed to me the Complaint aforeſaid: And I perceived well, that upon the * ſaid Information he had conceived great Diſpleaſure againſt the Judges of the Common Pleas, and chiefly againſt me; to which I (having the Copy of the Complaint ſent to me by the Lord Treaſurer the Sabbath-day before) anſwered in this Manner, That I had, with as much Brevity as the Time would permit, made Search in the Offices of the *Preignothories* of the Common Pleas: And as to the ſaid Caſes between *Bell* and *Thawptes*, and *Snell* and *Huet*, no ſuch could be found: But my Intent was not to take Advantage of a Miſpriſal: And the Truth was, that the ſixth Day of *February* the Court of Common Pleas had granted a Prohibition to the Preſident and Council of *York*, between *Lock* Plaintiff, and *Bell* and others Defendants: And that was, A Replevin in *Engliſh* was granted by the ſaid Preſident and Council, which I affirmed was utterly againſt Law: For at the Common Law no Replevin ought to be made, but by original Writ directed to the Sheriff. And the Statute of *Marlbridge*, *cap.* 21. and *Weſtm.* 1. *cap.* 17. hath authorized the Sheriff upon Plaint made to him, to make a Replevin; and all that appeareth by the ſaid Statutes, and by the Books of 29 *E.* 3. 21. 8 *Eliz. Dyer* 245. And the King neither by his Inſtructions had made the Preſident and Counſel Sheriffs, nor could grant to them Power to make a Replevin againſt the Law, nor againſt the ſaid Acts of Parliament; but the ſame ought to be made by the Sheriff. And all that was affirmed by the Lord Chancellor for very good Law: And I ſaid, that it might well be that we have granted other Prohibitions in other Caſes of *Engliſh*

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liſh Replevins. Another Prohibition I confeſs we have granted between Sir *Bethel Knight*, now Sheriff of the County of *York*, as Executor to one *Stephenſon*, who had made him and another his Executor, and preferred an Engliſh Bill againſt *Chambers*, and divers others of the Nature of an Action upon Caſe, upon a Trover and Converſion in the Life of the Teſtator of Goods and Chattels, to the Value of 1000 *l.* and becauſe the other Executor would not join with him, although he was named in the Bill, he had not any Remedy at the Common Law, he prayed Remedy there in Equity: And I ſay, that the Preſident and Council have not any Authority to proceed in that Caſe, for divers Cauſes.

1. Becauſe there is an expreſs Limitation in their Commiſſion, that they ſhall not hold Plea between Party and Party, *&c.* unleſs both Parties, or one of them, *tanta paupertate ſunt gravati*, that they cannot ſue at the Common Law: And in that Caſe the Plaintiff was a Knight, and Sheriff, and a Man of great Ability.

2. By that Suit the King was deceived of his Fine, for he ought to have had 200 *l.* Fine, becauſe that the Damages amounted to 4000 *l.* and that was one of the Cauſes that the Sheriff began his Suit there, and not at the Common Law: Another Cauſe was, that their Decrees which they take upon them are final and uncontroulable, either by Error, or any other Remedy. And yet the Preſident is a Nobleman, but not learned in the Law; and thoſe which are of the Counſel there, although that they have the Countenance of Law, yet they are not learned in the Law; and nevertheleſs they take upon them final and uncontroulable Decrees in Matters of great Importance: For if they may deny Relief to any at their Pleaſure without Controulment, ſo they may do it by their final Decrees without Error, Appeal, or other Remedy: Which is not ſo in the King's Courts where there are five Judges; for they can deny Juſtice to none who hath Right, nor give any Judgment, but the
Page [32] ſame is controulable by a Writ of Error, *&c.* * And if we ſhall not grant Prohibitions in Caſes where they hold Plea without Authority, then the Subjects ſhall be wrongfully oppreſſed without Law, and we denied to do them Juſtice: And their Ignorance in the Law appeareth by their Allowance of that Suit, *ſcil.* That the one Executor had no Remedy by the Common Law, becauſe the other would not join in Suit with him at the Common Law: Whereas every one learned in the Law knoweth, that Summons and Severance lieth in any Suit brought as Executors: And this alſo in that particular Caſe was affirmed by the Lord Chancellor;

cellor; and he much inveighed againſt Actions brought there upon Trover and Converſion, and ſaid, that they could not be found in our antient Books.

Another Prohibition I confeſs we have granted, between the L. *Wharton*, who by Engliſh Bill ſued before the Counſel, *Bancks*, *Buttermere*, and others, for Fiſhing in his ſeveral Fiſhings in *Darwent* in the County of *C.* in the Nature of an Action of Treſpaſs at the Common Law, to his Damage of 200 *l.* And for the Cauſes next before recited, and becauſe the ſame was meerly determinable at the Common Law, we granted a Prohibition, and that alſo was allowed by the Lord Chancellor. And as to the Caſe of Information upon the riotous Reſcous, I having forgotten to ſpeak to that, the King himſelf asked what the Caſe was? To whom I anſwered, that the Caſe was, That one exhibited a Bill there in the Nature of an Action of Debt, upon a *Mutuatus* againſt *Watſon*, who upon his Oath affirmed, that he had ſatisfied the Plaintiff, and that he owed him nothing, and yet becauſe the Defendant did not deny the Debt, the Counſel decreed the ſame againſt him, and upon that Decree the Purſuivant was ſent to arreſt the ſaid *Watſon*, who arreſted him, upon which the Reſcous was made: And becauſe that the Suit was in the Nature of an Action of Debt upon a *Mutuatus* at the Common Law, and the Defendant at the Common Law might have waged his Law, of which the Defendant ought not to be barred by that Engliſh Bill, *quia beneficium juris nemini eſt auferendum:* The Prohibition was granted; and that was affirmed alſo by the Lord Chancellor: Whereupon I concluded, that if the principal Cauſe doth not belong unto them, all their Proceedings was *coram non Judice*, and then no Reſcous could be done: But the Lord Chancellor ſaid, that though the ſame cannot be a Reſcous, yet it was a Riot, which might be puniſhed there: Which I denied, unleſs it were by Courſe of Law by Force of a Commiſſion of *Oyer* and *Terminer*, and not by an Engliſh Bill: But to give the King full Satisfaction in that Point, the Truth is, the ſaid Caſe was debated in Court, and the Court inclined to grant a Prohibition in the ſaid Caſe; but the ſame was ſtayed to be better adviſed upon, ſo as no Prohibition was ever under Seal in the ſaid Caſe.

Alſo I confeſs, that we have granted divers Prohibitions to ſtay Suits there by Engliſh Bill upon penal Statutes: For the Manner of Proſecution, as well for the Action, Proceſs, *&c.* as for the Count, is to be purſued, and cannot be altered, and therefore without Queſtion the

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Counsel in such Cases cannot hold Plea, which was also affirmed by the Lord Chancellor. And I said, that it was resolved in the Reign of Queen *Eliz.* in *Parot's* Case, and now lately in the Case of the President and Council of *Wales*, That no Court of Equity can be erected at this Day without Act of Parliament, for the Reasons and Causes in the Report of the said Case of *Parot*.

Page [33] And the King was well satisfied with these Reasons and Causes of * our Proceedings, who of his Grace gave me his Royal Hand, and I departed from thence in his Favour. And the Surmise of the Number, and that the Prohibition in the said Case in the Information was denied in the King's Bench, was utterly denied; for the same was moved when two Judges were in Court, who gave not any Opinion therein, but required Serjeant *Hurron* who moved it, to move the same again when the Court was full, &c.

XII. *Pasch.* 7 Jac. *Regis.*

Repair of Bridges, &c.

See 1 Hawk. ch. 7. sect. 1, 2, 3, 4, 5, 6. 1 Salk. 358, 359. 12 Co. 30. Part. 54, 98, &c.

NOTE, That this Term a Question was moved at *Serjeants-Inn*; Who by the Common Law ought to repair the Bridges, common Rivers, and Sewers, and the Highways, and by what Means they shall be compelled to it; and first of the Bridges: And as to them it is to be known, That of Common Right all the Country shall be charged to the Reparation of a Bridge; and therewith agreeth 10 *E.* 3. 28. *b.* That a Bridge shall be levied by the whole Country, because it is a common Easement for the whole Country; and as to that Point, the Statute of 22 *H.* 8. *cap.* 5 was but an Affirmance of the Common Law: And this is true, when no other is bound by the Law to repair it, but he who hath the Toll of the Men or Cattle which pass over a Bridge or Causey, ought to repair the same, for he hath the Toll to that Purpose, *Et qui sentit commodum sentire debet & onus* and

Barrett Mic 6 e Robins. 10 Mich. 593.

and therewith agrees 14 *E.* 3. *Bar* 276. Alſo a Man may be bounden to repair a Bridge, *ratione Tenure* of certain Land, but a particular Perſon cannot be bound by Preſcription, *ſcil.* That he and all his Anceſtors have repaired the Bridge, if it be not in Reſpect of the Tenure of his Land, taking of Toll, or other Profit; for the Act of the Anceſtor cannot charge the Heir without Profit. But an Abbot or other Corporation who hath a lawful Being may be charged, *ſcil.* That he and his Predeceſſors Time out of Mind, &c. have repaired the Bridge; for the Abbot and Covent may bind their Succeſſors. *Vide* 21 *E.* 4. 28. 27 *E.* 3. 8. 22 *Aſſ.* 8. 5 *H.* 7. 3. And if an Abbot and his Predeceſſors Time out of Mind have repaired a Bridge of Alms, they ſhall be compelled to repair it; and therewith agreeth 10 *Edw.* 3. 28. So it is of a Highway of Common Right, all the Country ought for to repair it, becauſe that the Country have their Eaſe and Paſſage by it, which ſtands with the Reaſon of the Caſe of the Bridge, but yet ſome may be particularly bounden to repair it as is aforeſaid. He who hath the Land adjoining, ought of common Right without Preſcription to ſcour and cleanſe the Ditches, next to the Way to his Land; and therewith agreeth the Book of 8 *H.* 7. 5. But he who hath Land adjoining without Preſcription, is not bound to repair the Way. So of a common River, of common Right all who have Eaſe and Paſſage by it, ought to cleanſe and ſcour it; for a common River is as a common Street, as it is ſaid in 22 *Aſſ.* and 37 *Aſſ.* 10. But he who hath Land adjoining to the River is not bounden to cleanſe the River, unleſs he hath the Benefit of it, *ſcil.* a Toll, or a Fiſhing, or other Profit. See 37 *Aſſ. p.* 10.

Sewers Poſt. 35.

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*XIII. *Paſch.* 7 Jacobi.

Sir William Read *and* Booth's *Caſe.*

Caſe of Forgery, &c. See 1 Sal. 342, 371, 375. 1 Hawk. ch. 70. per totum. 2 Hawk. ch. 8. ſect. 38. ch. 27. ſect. 28. ch. 43. ſect. 25. ch. 46. ſect. 19, &c 24. 4 Co. 18. 5 Co. 2. Part 50, 61. 10 Co. 103.

IN the great Caſe in the Star-chamber of a Forgery between Sir *William Read* Plaintiff, and *Roger Booth*, and *Cuthbert Booth*, and others, Defendants; the Caſe was this;

The ſaid *Roger Booth* 38 *Eliz.* was convicted in that Court of the Publication of a Writing under Seal, forged in the Name of Sir *Thomas Greſham*, of a Rent-charge of an hundred Pounds, out of all his Lands and Tenements, to one *Markham* for ninety-nine Years, bearing Date the one and twentieth Year of Queen *Elizabeth*; the ſaid *Roger* knowing it to be forged. And afterwards the ſaid Sir *William Read* exhibited the ſaid Bill againſt the ſaid *Booths* and others, for Forging of another Writing under Seal bearing Date the twentieth of *Eliz.* in the Name of the ſaid Sir *Thomas Greſham*, purporting a Deed of Feoffment of all his Lands (except certain) to Sir *Rowland Heyward* and *Edward Hoogon* and their Heirs, to certain Uſes; which was in Effect to the Uſe of *Markham* the younger and his Heirs: And for the Publication of the ſaid Writing, knowing the ſame to be forged, was the Bill exhibited. And now upon the Hearing of the Cauſe in the Star-chamber this Term, theſe Doubts were moved upon the Statute of 5 *Eliz.* 1. If one who is convicted of Publication of a Deed of Feoffment or Rent-charge, knowing the ſame to be forged, again at another Day forge another Deed of Feoffment, or Rent-charge, if he be within the Caſe of Felony within the ſaid Act (which Doubt ariſeth upon theſe Words (*eſtſoons*) committed again any of the ſaid Offences.) And therefore it was objected, that he ought to commit again the ſame Nature of Offence, *ſcil.* if he were convicted of Forgery he ought to forge again, and not only publiſh, knowing, *&c.* And if firſt he were convicted of Publiſhing, knowing, *&c.* he ought to offend again in Publication, knowing, *&c.* and not in Forgery, for (*eſtſoons*) which is (*iterum*) implieth that it ought to be of the ſame Nature of Offence. The ſecond Doubt

was

was, if a Man committed two Forgeries, the one in 37 of *Eliz.* and the other in 38, and he is first convicted of the last, if he may be now impeached for the first. The third Doubt was, when *Roger Booth* was convicted in 38 *Eliz.* and afterwards is charged with a new Forgery in 37 *Eliz.* if the Witnesses proving in Truth that it was forged after the first Conviction, if the Star-chamber hath Jurisdiction of it. The last Doubt was, when *Cuthert Booth* who never was convicted of Forgery before, if in Truth the Forgery was done, and so proved in 38 *Eliz.* if he might be convicted upon this Bill, because that the Forgery is alledged before that it was done. As to the first and second Doubts, it was resolved by the two Chief Justices and the Chief Baron, that if any one be convicted of Forgery or Publication of any Writing concerning Freehold, *&c.* within the first Branch; or concerning Interest or Term for Years, *&c.* within the second Branch, and be convicted, if afterwards he offend either against the first Branch or second, that the same is Felony: As if he forgeth a Writing concerning Interest for Years within the second Branch, and be convicted, and afterwards he forgeth a Charter of Feoffment within the first Branch, or *e converso*, * that that is Felony, and that by express Words of the Act; That if any Person or Persons being hereafter convicted or condemned of any of the said Offences (which Words, any of the said Offences, extend to all the Offences mentioned before, either in the first Branch, or in the second Branch) by any the Ways or Means above limited, shall after any such Conviction or Condemnation, eftsoons commit or perpetrate any of the said Offences, in Form aforesaid, which Words, *Any of the said Offences, &c.* do extend to the Nature of all the Offences mentioned in the first and second Branches: But if one forge a Writing in 37 of *Eliz.* and afterwards he forge another in 38 of *Eliz.* yet it is not Felony, although that he forgeth many Writings one after the other, for by the express Words of the Act, it is not Felony. The Forgery, *&c.* which is Felony by the Act, ought to be after Conviction or Condemnation of a former Writing. As to the third Doubt, it was resolved, That the Allegation of the Time by the Plaintiff in the Bill, shall not alter the Offence, but shall give unto the Court Jurisdiction; but if it appeareth to the Court, that the Forgery or Publication was after the Sentence, then the Court shall surcease. As to the last Point, it was resolved, That the Time of the Forgery is not material, be it before or after the Offence in Truth committed,

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mitted, if it be committed before the Exhibiting of the Bill; but if the Date of the Writing supposed to be forged had been mistaken, there the Defendant could not be condemned of a Deed of another Date, for that is not the Offence complained of in the Bill, of which the Court can give Sentence.

XIV. *Pasch.* 7 Jac. *Regis.*

The Case of Sewers.

Sewers, ant. 33. See 5 Co. 2. part 100. 6 Co 20. 10 Co. 138, 139 to 143.

THE Case was, That there was a Causey or Mill-stank of Stone in the River of *Dee* and City of *Chester*, which Causey before the Reign of King *Edward* the First, was erected for the necessary Maintenance of certain Mills, some of the Kings, and others of the Subjects at the End of the said Causey: And now a certain Decree was made by certain Commissioners of Sewers, for a Breach to be made of ten Poles in Length in the said Causey, which Causey as it was admitted by both Parties was erected before the Reign of King *Edward* the First, and so hath continued until this Day without any Exaltation or Inhancing: And if by any Decree of the Commissioners by Force of any Statute, any Breach may be made in that Causey, was the Question. And it was referred by the Letters of the Lords of the Privy Council, to the two Chief Justices and the Chief Baron; and upon hearing of Counsel learned at divers Days, and good Consideration had in the Time of the last Vacation, of all the Statutes concerning Sewers, and upon Conference had among themselves, it was resolved as followeth.

1. Whereas it is provided by the Statute of *Magna Charta, cap.* 23. *Quod omnes Kidelli deponantur de cetero per Thamesiam, & Medewaiam & per totam Angl. nisi per Costeram Maris.* It was resolved, That that Statute extended only to *Kidells, &c.* open Wears for taking of Fish, but the first Statute which extended to pulling down, or abating of any Mills, Mill-stanks and Causeys, was the Statute of 25 *E.* 3. *cap.* 4. which Act

appointed

appointed such only to be thrown down or abated, which were levied or erected in the Reign of King *Edward* the First, or after: * But by the Statute made *An.* 1 *H.* 4. *cap.* 12. upon Complaint in Parliament of the great Damages which have risen by the outragious Inhancing of Mills, Mill-stanks, and other Impediments made and erected before the Reign of King *Edward* the First: The said old Mills and Mill-stanks were appointed by Act then made to be surveyed, and such as were found to be much inhanced to be corrected and amended; saving always reasonable Substance of such Mills, Mill-stanks, Wears, *&c.* so in old Time made and levied: None of which Acts extended to the Case in Question; for that Causey was erected before the Reign of *Edward* the First, and never exalted or inhanced after the Erection of it: And the Statute of 12 *H.* 4. *cap.* 7. doth confirm all the said Acts, and by them the Generality of the Act of *Magna Charta* is restrained, as by the said Acts appeareth. And by the Statute of 23 *H.* 8. *cap.* 5. None of the said Acts as to the Case in Question is repealed; for first, the same Act appoints the Manner, Form, Tenor, and Effect of the Commission of Sewers, by which Power is given to the Commissioners to survey Walls, *&c.* Fences, Causeys, *&c.* Mills, *&c.* and then to correct, repair, amend, pull down or overthrow, or reform, as Cause requireth, according to their Wisdoms and Discretions; and therein as well to ordain and do after the Form, Tenor and Effect of all and singular the Statutes and Ordinances made before the first of *March*, in the twenty-third Year of *Henry* the Eighth, as also to enquire by the Oaths of honest and lawful Men, *&c.* through whose Default the said Hurts and Damages have happened, *&c.* By which it appeareth, That the Discretion of the Commissioners was limited, *scil.* to proceed according to the Statutes and Ordinances before made, *&c.* and also to reform, repair, and amend the said Walls, *&c.* which by Force of that Word (said hath Relation to the precedent Purview of the Act, *&c.* And further to reform, prostrate and overthrow all such Mills, *&c.* and other Impediments and Annoyances (aforesaid) as shall be found by Inquisition or by your Survey and Discretion to be excessive, *i. e.* hurtful; which Word (aforesaid) refers that Clause also to the precedent Purview, *scil.* such Impediments and Annoyances as are against the Statutes and Ordinances before made. Also it is further provided by the same Act, That all and every Statute, Act, and Ordinance

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heretofore made concerning the Premiſſes or any of them, not being contrary to this preſent Act, nor heretofore repealed, ſhall from henceforth ſtand and be good and effectual for ever. But the ſaid Acts of 25 *E.* 3. and 1 *H.* 4. are not contrary to any Clauſe of that Act, nor were repealed before: And always ſuch Conſtruction ought to be made, that one Part of the Act may agree with another, and all to ſtand together; and if they had intended a Repeal of the ſaid former Acts, they would not have repealed them by ſuch general and doubtful Words, when they concerned the Inheritances of many Subjects: And according to this Reſolution we certified the Lords of the Council, that the ſaid Statutes of 25 *E.* 3. and 1 of *H.* 4. remained yet in Force; and that the Authority given by the Commiſſion of Sewers did not extend to Mills, Mill-ſtanks, Cauſeys, &c. erected before the Reign of King *Ed.* 1. unleſs that they have been inhanced and exalted above their former Height, and thereby made more prejudicial, &c. In which Caſe they are not to be overthrown or ſubverted, but to be reformed by abating the Exceſs and Inhancement only.

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* XIV. *Trin.* 7 Jac. *Regis.*

The Case De Modo Decimandi, *and of Prohibitions debated before the King's Majeſty.*

De Modo Decimandi ant. 12. poſt. 58. 2 Inſt. 607. Gibſon's Codex 1073. Watſon's Clergyman 503, 509, &c. 538, &c. 543, &c. to 568.

Richard Bancroft Archbiſhop of *Canterbury*, accompanied with the Biſhop of *London*, the Biſhop of *Bath* and *Wells*, the Biſhop of *Rocheſter*, and divers Doctors of the Civil and Canon Law, as Dr. *Dunn*, Judge of the Archives; Dr. *Bennet*, Judge of the Prerogative, Dr. *James*, Dr. *Martin*, and divers other Doctors of the Civil and Canon Law, came attending upon them to the King to *Whitehall* the Thurſday, Friday, and Saturday after *Eaſter* Term in the Council-chamber; where the Chief Juſtice and my ſelf, *Daniel* Judge of

of the Common Pleas, and *Williams* Judge of the King's Bench, by the Command of the King attended alſo: Where the King being aſſiſted by his Privy Council, all ſitting at the Council-table, ſpake as a moſt gracious, good, and excellent Sovereign, to this Effect; *As I would not ſuffer any Novelty or Innovations in my Courts of Juſtice Eccleſiaſtical and Temporal; ſo I will not have any of the Laws, which have had judicial Allownces in the Times of the Kings of* England *before me, to be forgotten, but to be put in Execution. And foraſmuch as upon the Contentions between the Eccleſiaſtical and Temporal Courts great Trouble, Inconvenience, and Loſs may ariſe to the Subjects of both Parts; namely, when the Controverſy ariſeth upon the Juriſdiction of my Courts of ordinary Juſtice; and becauſe I am the Head of Juſtice immediately under God, and knowing what Hurt may grow to my Subjects of both Sides, when no private Caſe, but when the Juriſdictions of my Courts are drawn in Queſtion, which in Effect concerneth all my Subjects, I thought that it ſtood with the Office of a King, which God hath committed to me, to hear the Controverſies between the Biſhops and other of his Clergy, and the Judges of the Laws of* England, *and to take Order, that for the Good and Quiet of his Subjects, that the one do not incroach upon the other, but that every of them, hold themſelves within their natural and local Juriſdiction, without Incroachment or Uſurpation the one upon the other.* And he ſaid, that the only Queſtion then to be diſputed was, If a Parſon, or a Vicar of a Pariſh ſueth one of his Pariſh in the Spiritual Court for Tithes in Kind, or Lay-fee, and the Defendant alledgeth a Cuſtom or Preſcription, *De Modo Decimandi*, if that Cuſtom or Preſcription, *De Modo Decimandi*, ſhall be tried and determined before the Judge Eccleſiaſtical where the Suit is begun; or a Prohibition lieth, to try the ſame by the Common Law. And the King directed, that we who were Judges ſhould declare the Reaſons and Cauſes of our Proceedings, and that he would hear the Authorities in the Law which we had to warrant our Proceedings in Granting of a Prohibition in Caſes of *Modo Decimandi*. But the Archbiſhop of *Canterbury* kneeled before the King, and deſired him, that he would hear him and others who are provided to ſpeak in the Caſe for the Good of the Church of *England*; and the Archbiſhop himſelf inveighed much againſt two Things: 1. That a *Modus Decimandi* ſhould be

Page [38] * tried by a Jury, because that they themselves claim more or less a *Modum Decimandi*; so as in Effect they were Triers in their own Cause, or in the like Cases. 2. He inveighed much against the precipitate and hasty Trials by Juries, and after him Dr. *Bennet*, Judge of the Prerogative Court, made a large Invection against Prohibitions *in Causis Ecclesiasticis*: And that both Jurisdictions as well Ecclesiastical as Temporal were derived from the King; but all that which he spake out of the Book which Dr. *Ridley* hath lately published, I omit as impertinent: and he made five Reasons, why they should try a *Modum Decimandi*.

And the first and principal Reason was out of the Register, *fo.* 58. *quia non est consonans rationi, quod cognitio accessarii in Curia Christianitatis impediatur ubi cognitio Causæ principalis ad forum Ecclesiasticum noscitur pertinere.* And the principal Cause is Right of Tithes, and the Plea of *Modo Decimandi* founds in Satisfaction of Tithes; and therefore the Conusance of the original Cause, (*scil.*) the Right of Tithes appertaining to them, the Conusance of the Bar of Tithes, which he said was but the Accessary, and as it were dependant upon it, appertained also to them. And whereas it is said in the Bishop of *Winchester*'s Case, 2 Co. 43, 44, &c. in the second Part of my *Reports*, and 8 *E.* 4. 14. that they would not accept of any Plea in Discharge of Tithes in the Spiritual Court, he said, that they would allow such Pleas in the Spiritual Court, and commonly had allowed them; and therefore he said, that that was the Mystery of Iniquity founded upon a false and feigned Foundation, and humbly desired the Reformation of that Error, for they would allow *Modum Decimandi* being duly proved before them.

Note. 2. There was great Inconveniency, that Laymen should be Triers of their own Customs, if a *Modus Decimandi* should be tried by Jurors; for they shall be upon the Matter Jurors (*i. e.* Judges) in their own Cause.

Post. 58. Antea 12, 14. 3. That the Custom *De modo Decimandi* is of Ecclesiastical Jurisdiction and Conusance, for it is a Manner of Tithing, and all manner of Tithing belongs to Ecclesiastical Jurisdiction: and therefore he said, that the Judges, in their Answer to certain Objections made by the Archbishop of *Canterbury*, have confessed, that Suit may be had in Spiritual Courts *pro modo Decimandi*; and therefore the same is of Ecclesiastical Conusance; and by Consequence it shall be tried before the Ecclesiastical Judges: For if the Right of Tithes be of Ecclesiastical Conusance, and the Satisfaction also for them of the same Jurisdiction, the same shall be tried in the Ecclesiastical Court.

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4. In the Prohibitions of *Modus Decimandi* Averment is taken, That although the Plaintiff in the Prohibition offereth to prove *Modum Decimandi*, the Eccleſiaſtical Court doth refuſe to allow of it, which was confeſſed to be a good Cauſe of Prohibition: But he ſaid, they would allow the Plea *De modo Decimandi* in the Spiritual Court, and therefore *ceſſante cauſa ceſſabit & effectus*, and no Prohibition ſhall lie in the Caſe. Averment. Antea 14. Poſt. 44.

5. He ſaid, That he can ſhew many Conſultations granted in the Cauſe *De modo Decimandi*, and a Conſultation is of greater Force than a Prohibition; for Conſultation, as the Word imports, is made by the Court with Conſultation and Deliberation. And *Bacon*, Solicitor General, being (as it is ſaid) aſſigned with the Clergy by the King, argued before the King, and in Effect ſaid leſs than Dr. *Bennet* ſaid before; but he vouched 1 *R.* 3. 4. the Opinion of *Huſſey*, when the Original ought to begin in the Spritual Court, and afterwards a * Thing cometh in Iſſue which is triable in our Law, yet it ſhall be tried by their Law: As if a Man ſueth for a Horſe deviſed to him, and the Defendant ſaith, that the Deviſor gave to him the ſaid Horſe, the ſame ſhall be tried there. And the *Regiſter* 57 and 58. If a Man be condemned in Expenſes in the Spiritual Court for laying violent Hands upon a Clerk, and afterwards the Defendant pays the Coſts, and gets an Acquittance, and yet the Plaintiff ſueth him againſt his Acquittance for the Coſts, and he obtains a Prohibition, for that Acquittances and Deeds are to be determined in our Law, yet he ſhall have a Conſultation, becauſe that the Principal belongeth to them, 38 *E.* 3. 5. Right of Tithes between two ſpiritual Perſons ſhall be determined in the Eccleſiaſtical Court. And 38 *E.* 3. 6. where the Right of Tithes comes in Debate between two ſpiritual Perſons, the one claiming the Tithes as of common Right within his Pariſh, and the other claiming to be diſcharged by real Compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it. *Page* [39]

And the ſaid Judges made humble Suit to the King, That for as much as they perceived that the King in his Princely Wiſdom did deteſt Innovations and Novelties, that he would vouchſafe to ſuffer them with his gracious Favour, to inform him of one Innovation and Novelty which they conceived would tend to the Hindrance of the good Adminiſtration and Execution of Juſtice within his Realm,

Your

Your Majesty, for the great Zeal which you have to Justice, and for the due Administration thereof, hath constituted and made fourteen Judges, to whom you have committed not only the Administration of ordinary Justice of the Realm, but *crimina læsæ Majestatis*, touching your Royal Person, for the legal Proceeding: Also in Parliament we are called by Writ, to give to your Majesty and to the Lords of the Parliament our Advice and Council, when we are required: We two Chief Justices sit in the Star-Chamber, and are oftentimes called into the Chancery, Court of Wards, and other High Courts of Justice: We in our Circuits do visit twice in the Year your Realm, and execute Justice according to your Laws: and if we who are your Publick Judges receive any Diminution of such Reverence and Respect in our Places, which our Predecessors had, we shall not be able to do you such acceptable Service as they did, without having such Reverence and Respect as Judges ought to have. The State of this Question is not in *statu deliberativo*, but *in statu judiciali*; it is not disputed *de bono*, but *de vero*, *non de Lege fienda*, *sed de Lege lata*; not to frame or devise new Laws, but to inform your Majesty what your Law of *England* is: And therefore it was never seen before, that when the Question is of the Law, that your Judges of the Law have been made Disputants with him who is inferior to them, who Day by Day plead before them at their several Courts at *Westminster*: and although we are not afraid to dispute with Mr. *Bennet* and Mr. *Bacon*, yet this Example being *primæ impressionis*, and your Majesty detesting Novelties and Innovations, we leave it to your Grace and Princely Consideration, whether your Majesty will permit our answering *in hoc statu judiciali*, to this Charge upon your Publick Judges of the Realm? But in Obedience to your Majesty's Command, We, with your Majesty's gracious Favour, in most humble Manner will inform your Majesty touching the said Question, which we, and our Predecessors before us, have oftentimes adjudged upon judicial Proceedings in your Courts of Justice at *Westminster*: Which Judgments cannot be reversed or examined for any Error in Law, Page [40] if * not by a Writ of Error in a more high and supream Court of Justice, upon legal and judicial Proceedings: And that is the ancient Law of *England*, as appeareth by the Statute of 4 *H.* 4. *cap.* 22.

And we being commanded to proceed; all that which was said by us, the Judges, was to this Effect, That the Trial *De Modo Decimandi* ought to be by the Common Law

Law by a Jury of twelve Men, it appeareth in three Manners: First, by the Common Law: Secondly, by Acts of Parliament: And lastly, by infinite Judgments and judicial Proceedings long Times past without any Impeachment or Interruption.

But first it is to see, What is a *Modus Decimandi*? *Modus Decimandi* is, when Lands, Tenements or Hereditaments have been given to the Parson and his Successors, or an annual certain Sum, or other Profit, always, Time out of Mind, to the Parson and his Successors, in full Satisfaction and Discharge of all the Tithes in kind in such a Place; and such Manner of Tithing is now confessed by the other Party to be a good Bar of Tithes in kind. Módus Decimandi. See Watson's Clergyman, 509, &c.

2. That *Modus Decimandi* shall be tried by the Common Law, that is, that all Satisfactions given in Discharge of Tithes, shall be tried by the Common Law: And therefore put that which is the most common Case; That the Lord of the Manor of *Dale* prescribes to give to the Parson 40*s.* yearly, in full Satisfaction and Discharge of all Tithes growing and renewing within the Manor of *Dale*, at the Feast of *Easter*: The Parson sueth the Lord of the Manor of *Dale* for his Tithes of his Manor in Kind, and he in Bar prescribes in manner *ut supra*: The Question is, if the Lord of the Manor of *Dale* may upon that have a Prohibition, for if the Prohibition lieth, then the Spiritual Court ought not to try it; for the End of the Prohibition is, That they do not try that which belongs to the Trial of the Common Law; the Words of the Prohibition being, that they would draw the same *ad aliud examen*.

First, The Law of *England* is divided into Common Law, Statute-Law, and Customs of *England*; and therefore the Customs of *England* are to be tried by the Trial which the Law of *England* doth appoint.

Secondly, Prescriptions by the Law of the Holy Church, and by the Common Law, differ in the Times of Limitation; and therefore Prescriptions and Customs of *England* shall be tried by the Common Law. See 20 *H.* 6. *fol.* 17. 9 *E.* 3. *Jurisdiction* 28. The Bishop of *Winchester* brought a Writ of Annuity against the Archdeacon of *Surr.* and declared, how that he and his Ancestors were seised by the Hands of the Defendant by Title of Prescription, and the Defendant demanded Judgment, if the Court should hold Jurisdiction being between Spiritual Persons, &c. *Stone* Justice, Be assured, that upon Title of Prescription we will here hold Jurisdiction; and upon this *Wilby* Chief Justice gave the Rule, Answer over: upon which it follows, that if a *Modus Decimandi*, which

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is an annual Sum for Tithes by Preſcription, comes in Debate between ſpiritual Perſons, that the ſame ſhall be tried here: For the Rule of the Book is general, (*ſcil.*) upon Title of Preſcription, We will hold Juriſdiction, and that is fortified with an Aſſeveration, *Know aſſuredly*; as if he ſhould ſay, that it is ſo certain, that it is without Queſtion. 32 *E.* 3. *Juriſd.* 26. There was a Vicar who had only Tithes and Oblations, and an Abbot claimed an Annuity or Penſion of him by Preſcription: And it was adjudged, that the ſame * Preſcription, although it was betwixt ſpiritual Perſons, ſhould be tried by the Common Law. *Vide* 22 *H.* 6. 46 and 47. A Preſcription, that an Abbot Time out of Mind had found a Chaplain in his Chapel to ſay Divine Service, and to miniſter Sacraments, tried at the Common Law.

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3. See the Record of 25 *H.* 3. cited in the Caſe of *Modus Decimandi* before; and ſee Regiſter *fol.* 38. where Lands are given in Satisfaction and Diſcharge of Tithes.

4. See the Statute of *Circumſpecte agatis*, *Decimæ debitæ ſeu conſuetæ*, which proves that Tithes in Kind, and a *Modus* by Cuſtom, *&c.* differ.

5. 8 *E.* 4. 14. and *F. N. B.* 41. *G.* A Prohibition lieth for Lands given in Diſcharge of Tithes. 28 *H.* 3. 97. There Suit was for Tithes, and a Prohibition lieth, and ſo abridged by the Book, which of Neceſſity ought to be upon Matter *De Modo Decimandi*, or Diſcharge.

6. 7 *E.* 6. 79. If Tithes are ſold for Money, by the Sale the Things Spiritual are made Temporal, and ſo in the Caſe *De Modo Decimandi*, 42 *E.* 3. 12. agrees.

7. 22 *E.* 3. 2. Becauſe an Appropriation is mixt with the Temporalty, (*ſcil.*) the King's Letters Patent, the ſame ought to be ſhewed how, *&c.* otherwiſe of that which is meer Temporal: And ſo it is of real Compoſition, for which the Patron ought to join. *Vide* 11 *H.* 4. 85. Compoſition by Writing, that the one ſhall have the Tithes and the other ſhall have Money, the Suit ſhall be at the Common Law.

Secondly, By Acts of Parliament.

1. The ſaid Act of *Circumſpecte agatis*, which gives Power to the Eccleſiaſtical Judge to ſue for Tithes due of in Kind, or by Cuſtom, *i. e. Modus Decimandi*: So by Authority of that Act, although that the yearly Sum foundeth in the Temporalty, which was paid by Cuſtom Diſcharge of Tithes, yet becauſe the ſame cometh in Place of Tithes, and by Conſtitution, the Tithes are changed into Money, and the Parſon hath not any Re-

for the ſame, which is the *Modus Decimandi* at the Common Law; for that Cauſe the Act is clear, that the ſame was a Doubt at the Common Law: And the Statute of *Articuli Cleri, cap.* 1. If corporal Penance be changed *in pœnam pecuniariam*, for that Pain Suit lieth in the Spiritual Court: For ſee *Mich.* 8 *H.* 3. *Rot.* 6. *in Theſaur.* A Prohibition lieth *pro eo quod Rector de Cheſterton exigit de Hugone de Logis de certa portione pro Decimis Molendinarum*; ſo as it appeareth, it was a Doubt before the ſaid Statute, if Suit lay in the Spiritual Court *De Modo Decimandi.* And by the Statute of 27 *H.* 8. *cap.* 20. it is provided and enacted, That every of the Subjects of this Realm, according to the Eccleſiaſtical Laws of the Church, and after the laudable Uſages and Cuſtoms of the Pariſh, *&c.* ſhall yield and pay his Tithes, Offerings, and other Duties: And that for Subſtraction of any of the ſaid Tithes, Offerings, or other Duties, the Parſon, *&c.* may by due Proceſs of the King's Eccleſiaſtical Laws, convent the Perſon offending before a competent Judge, having Authority to hear and determine the Right of Tithes, and alſo to compel him to yield the Duties, *i. e.* as well *Modus Decimandi*, by laudable Uſage or Cuſtom of the Pariſh, as Tithes in Kind: And with that in Effect agrees the Statute of 32 *H.* 8. *cap.* 7. By the Statute of 2 *E.* 3. *c.* 13. it is enacted, That every of the King's Subjects ſhall from henceforth, truly and juſtly, without Fraud or Guile, divide, *&c.* and pay all manner of their predial Tithes in their proper Kind, as they riſe * and happen in ſuch Manner and Form as they have been of Right yielded and paid within 40 Years next before the Making of this Act, or of Right and Cuſtom ought to have been paid. And after in the ſame Act there is this Clauſe and Proviſo, Provided always, and be it enacted, That no Perſon ſhall be ſued, or otherwiſe compelled to yield, give, or pay any manner of Tithes for any Manors, Lands, Tenements, or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Preſcription, are not chargeable with the Payment of any ſuch Tithes, or that be diſcharged by any Compoſitions real. And afterwards, there is another Branch in the ſaid Act; and be it further enacted, That if any Perſon do ſubſtract or withdraw any manner of Tithes, Obventions, Profits, Commodities, or other Duties before mentioned (which extends to Cuſtom of Tithing, *i. e. Modus Decimandi*, mentioned before in the Act, *&c.*) that then the Party ſo ſubſtracting, *&c.* may be convented and ſued in the King's Eccleſiaſtical Court, *&c.* And upon the ſaid Branch, which is in the Negative, That no Perſon ſhall be ſued for any Tithes of any Lands

Probibition. Antea 8. &c. 17, &c. Poſt. 70. Poſt 47, &c.

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Lands which are not chargeable with the Payment of such Tithes by any Law, Statute, Privilege, Preſcription, or real Compoſition. And always when an Act of Parliament commands or prohibits any Court, be it Temporal or Spiritual, to do any Thing temporal or ſpiritual, if the Statute be not obeyed, a Prohibition lieth: As upon the Statute *de articulis ſuper Cartas, ca.* 4. *Quod communia Placita non tenentur in Scaccario:* A Prohibition lieth to the Court of Exchequer, if the Barons hold a Common Plea there, as appeareth in the Regiſter 187. *b.* So upon the Statute of *Weſtm.* 2. *Quod inquiſitiones quæ magnæ ſunt examinationis non capiantur in patria*; a Prohibition lieth to the Juſtices of *Niſi prius.* So upon the Statute of *Articuli ſuper Cartas, cap.* 7. *Quod Conſtabularius Caſtr.* Dover, *non teneat Placitum forinſecum quod non tangit Cuſtodiam Caſtri,* Regiſter 185. So upon the ſame Statute, *cap.* 3. *Quod Seneſcallus & Mariſcallus non teneant Placita de libero tenemento, de debito conventione, &c.* a Prohibition lieth 185. And yet by none of theſe Statutes, is any Prohibition or *Superſedeas* given by expreſs Words of the Statute. So upon the Statutes 13 *R.* 2. *cap.* 3. 15 *R.* 2. *cap.* 2. 2 *H.* 4. *cap.* 11. by which it is provided, That Admirals do not meddle with any Thing done within the Realm, but only with Things done upon the Seas, *&c.* a Prohibition lieth to the Court of Admiralty. So upon the Statute of *Weſtm.* 2. *cap.* 43. againſt Hoſpitalers and Templars, if they do againſt the ſame Statute, *Regiſt.* 39. *a.* So upon the Statute *de prohibitione regia, Ne laici ad citationem Epiſcopi conveniant ad recognitionem faciend. vel Sacrament. præſtanda niſi in caſibus matrimonialibus & Teſtamentariis,* a Prohibition lieth. *Regiſt.* 36. *b.* And ſo upon the † Statute of 2 *H.* 5. *cap.* 3. at what Time the Libel is grantable by the Law that it be granted and delivered to the Party without Difficulty, if the Eccleſiaſtical Judge, when the Cauſe which depends before him is meer Eccleſiaſtical, denieth the Libel, a Prohibition lieth, becauſe that he doth is againſt the Statute; and yet no Prohibition by any expreſs Words is given by the Statute. And upon the ſame Statute the Caſe was in 4 *E.* 3. 37. *Pierce Peckam* took Letters of Adminiſtration of the Goods of *Roſe Brown* of the Biſhop of *London* and afterwards *T. T.* ſued to *Thomas* Archbiſhop of *Canterbury,* That becauſe the ſaid *Roſe Brown* had Goods within his Dioceſe, he prayed Letters of Adminiſtration to be committed to him, upon which the Biſhop granted him Letters of Adminiſtration, and afterwards * *T. T.* libelled in the Spiritual Court of the Archbiſhop in the *Arches* againſt *Pierce Peckham,* to whom the Biſhop of *London* had committe

See Lib. Entr. 450. a Prohibition was upon the Statute that one ſhall not maintain; and ſo upon every penal Law. See F.N.B. 39. B. Prohibition to the Common Pleas upon the Stat. of Magna Charta that they do not proceed in a Writ of Præcipe in Capite, where the Land is not holden of the King. 1 & 2 Eliz. Dy. 170, 171. Prohibition upon the Statute of Barrenes, and Pettit is only prohibited by Implication.

† See 12 Co. 61, &c. ib.

mitted Letters of Adminiſtration to repeal the ſame: And *Pierce Peckham*, according to the ſaid Statute, prayed a Copy of the Libel exhibited againſt him, and could not have it, and thereupon he ſued a Prohibition, and upon that an Attachment: And there *Catesby* Serjeant moved the Court, that a Prohibition did not lie, for two Cauſes: 1. That the Statute gives that the Libel ſhall be delivered, but doth not ſay that the Plea in the Spiritual Court ſhall ſurceaſe by Prohibition. 2. The Statute is not intended of Matter meer ſpiritual, as that Caſe is, to try the Prerogative and the Liberty of the Archbiſhop of *Canterbury* and the Biſhop of *London*, in committing of Adminiſtrations. And there *Danby* Chief Juſtice, If you will not deliver the Libel according to the Statute, you do Wrong, which Wrong is a temporal Matter, and puniſhable at the Common Law; and therefore in this Caſe the Party ſhall have a ſpecial Prohibition out of this Court, reciting the Matter, and the Statute aforeſaid, commanding them to ſurceaſe, until he had the Copy of the Libel delivered unto him: Which Caſe is a ſtronger Caſe than the Caſe at the Bar, for that Statute is in the Affirmative, and the ſaid Act of 2 *E. 6. cap.* 13. is in the Negative, *ſcil.* That no Suit ſhall be for any Tithes of any Land in Kind where there is *Modus Decimandi*, for that is the Effect of the ſaid Act, as to that Point. And always after the ſaid Act, in every Term in the whole Reigns of King *E. 6.* Queen *Mary*, and Queen *Elizabeth*, until this Day, Prohibitions have been granted *in Cauſa Modi Decimandi*, and Judgments given upon many of them, and all the ſame without Queſtion made to the contrary. And accordingly all the Judges reſolved in 7 *E. 6. Dyer* 79. *Et contemporanea expoſitio eſt optima & fortiſſima in lege, & a communi obſervantia non eſt recedendum, & minime mutanda ſunt quæ certam habuerunt interpretationem.*

See 2 Inſt. 648, to 664.

And as to the firſt Objection, that the Plea of *Modus Decimandi* is but acceſſary to the Right of Tithes; it was reſolved, that the ſame was of no Force, for three Cauſes.

1. In this Caſe, admitting that there is a *Modus Decimandi*, then by the Cuſtom, and by the Act of 2 *E. 6.* and the other Acts, the Tithes in Kind are extinct and diſcharged; for one and the ſame Land cannot be ſubject to two Manner of Tithes, but the *Modus Decimandi* is all the Tithe with which the Land is chargeable: As if a Horſe or other Thing valuable be given in Satisfaction of the Duty, the Duty is extinct and gone: And it ſhall be intended, that the *Modus Decimandi* began at the firſt by Real Compoſition, by which the Lands were diſcharged of the Tithes, and a yearly Sum in Satisfaction of them aſ-

A Modus extinguiſhes Tithes in Kind. Antea 13, 14, 16.

ſigned

ſigned to the Parſon, &c. So as in this Caſe there is neither Principal nor Acceſſary, but an Identity of the ſame Thing.

2. The Statute of 2 *E.* 6. being a Prohibition in it ſelf, and that in the Negative, if the Eccleſiaſtical Judge doth againſt it, a Prohibition lieth, as it appeareth clearly before.

3. Although that the Rule be general, yet it appeareth by the Regiſter it ſelf, that a *Modus Decimandi* is out of it; for there is a Prohibition *in Cauſa Modi Decimandi*, when Lands are given in Satisfaction of the Tithes.

As to the ſecond Objection, it was anſwered and reſolved, That that was from, or out of the Queſtion; for *ſtatus Quæſtionis non eſt * deliberativus ſed judicialis*, what Page [44] was fit and convenient, but what the Law is: And yet it was ſaid, It ſhall be more inconvenient to have an Eccleſiaſtical Judge, who is not ſworn to do Juſtice, to give Sentence in a Caſe between a Man of the Clergy and a Layman, than for twelve Men ſworn to give their Verdict upon Hearing of Witneſſes *viva voce*, before an indifferent Judge, who is ſworn to do Right and Juſtice to both Parties: But convenient or inconvenient is not the Queſtion. Alſo they have in the Spiritual Court ſuch infinite Exceptions to Witneſſes, that it is at the Will of the Judge with which Party he ſhall give his Sentence.

As to the third Objection, it was anſwered and reſolved, Firſt, That *ſatisfactio pecuniaria* of it ſelf is Temporal. But for as much as the Parſon hath not Remedy *pro Modo Decimandi* at the Common Law, the Parſon by Force of the Acts cited before might ſue *pro Modo Decimandi* in the Eccleſiaſtical Court: But that doth not prove, That he ſueth for Tithes in Kind, which are utterly extinct, and the Land diſcharged of them, that upon the Plea *De Modo Decimandi*, a Prohibition ſhould not lie, for that without all Queſtion it appeareth by all that which before hath been ſaid, that a Prohibition doth lie. See alſo 12 *H.* 24. *b.* Where the original Cauſe is the Spiritual, and the proceed upon a Temporal, a Prohibition lieth. See 39 *E.* 22 *E.* 4. *Conſultation*, That Right of Tithes which meerly Eccleſiaſtical, yet if the Queſtion ariſeth of the mits of a Pariſh, a Prohibition lieth: And this Caſe of Limits of a Pariſh was granted by the Lord Chancel and not denied by the other Side.

Antea 14, 38. As to the fourth Objection, that an Averment is ta of the Refuſal of the Plea *De Modo Decimandi*; it anſwered and reſolved, That the ſame is of no Force for vers Cauſes:

1. It is only to inforce the Contempt.

2. If the Spiritual Court ought to have the Trial *de Modo Decimandi*, then the Refuſal of Acceptance of ſuch a Plea ſhould give Cauſe of Appeal, and not of Prohibition: As if an Excommunication, Divorce, Hereſy, Simony, *&c.* be pleaded there, and the Plea refuſed, the ſame gives no Cauſe of Prohibition: As, if they deny any Plea, meer Spiritual Appeal, and no Prohibition lieth.

See the Proem to Gibſon's Codex, and the Codex, p. 703, 735. Watſon's Clergyman, chap. 54, 55, 56, and p. 586.

3. From the Beginning of the Law, no Iſſue was ever taken upon the Refuſal of the Plea *in Cauſa Modi Decimandi*, nor any Conſultation ever granted to them, becauſe they did not refuſe, but allowed the Plea.

4. The Refuſal is no Part of the Matter iſſuable or material in the Plea; for the ſame is no Part of the Suggeſtion which only is the Subſtance of the Plea: And therefore the *Modus Decimandi* is proved by two Witneſſes, according to the Statute of 2 *E.* 6. *cap.* 13. and not the Refuſal, which proveth, that the *Modus Decimandi* is only the Matter of the Suggeſtion, and not the Refuſal.

5. All the ſaid five Matters of Diſcharge of Tithes mentioned in the ſaid Branch of the Act of 2 *E.* 6. being contained within a Suggeſtion, ought to be proved by two Witneſſes, and ſo have been always from the Time of the Making of the ſaid Act; and therefore the Stat. of 2 *E.* 6. clearly intended, that Prohibitions ſhould be granted in ſuch Cauſes.

6. Although that they would allow *bona fide de Modo Decimandi*, without Refuſal, yet if the Parſon ſueth there for Tithes in Kind, when the *Modus* is proved, the ſame being expreſly prohibited by the * Act of 2 *E.* 6. a Prohibition lieth, although the *Modus* be ſpiritual, as appeareth by the ſaid Book of 4 *E.* 4. 37. and other the Caſes aforeſaid.

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Third Days Debate.

And afterwards, in the third Day of Debate of this Caſe before his gracious Majeſty, Dr. *Bennet* and Dr. *Martin* had reſerved divers Conſultations granted *in Cauſa Modi Decimandi*, thinking that thoſe would make a great Impreſſion in the Opinion of the King: And thereupon they ſaid, That Conſultations were the Judgments of Courts had upon Deliberation, whereas Prohibitions were only granted upon Surmiſes: And they ſhewed four Precedents:

One, where three jointly ſued a Prohibition in the Caſe of *Modo Decimandi*, and the Conſultation ſaith, *Pro eo quod ſuggeſtio materiaque in eadem contenta minus ſufficiens in Lege exiſtit, &c.*

2. Another *in Cauſa Modi Decimandi*, to be paid to the Parſon or Vicar.

3. Where the Parson sued for Tithes in Kind, and the Defendant alledged *Modus Decimandi* to be paid to the Vicar.

The Fourth, where the Parson libelled for Tithe Wool, and the Defendant alledged a Custom, to reap Corn, and to make it into Sheaves, and to set forth the tenth Sheaf at his Charges, and likewise of Hay, to sever it from the nine Cocks at his Charge, in full Satisfaction of the Tithes of the Corn, Hay, and Wool.

To which I answered, and humbly desired the King's Majesty to observe that these have been reserved for the last, and center Point of their Proof: And by them your Majesty shall observe these Things:

1. That the King's Courts do them Justice, when with their Consciences and Oaths they can.

2. That all the said Cases are clear in the Judgment of those who are learned in the Laws, that Consultation ought by the Law to be granted.

For as unto the first Precedent, the Case upon their own Shewing appeareth to be, Three Persons joined in one Prohibition for three several Parcels of Land, each of which had a several Manner of Tithing; and for that Cause they could not join, when their Interests were several; and therefore a Consultation was granted.

As to the second Precedent, The Manner of Tithing was alledged to be paid to the Parson or Vicar, which was altogether uncertain.

As to the third Precedent, The *Modus* never came in Debate, but whether the Tithes did belong to the Parson or Vicar? Which being betwixt two spiritual Persons, the Ecclesiastical Court shall have Jurisdiction: And therewith agreeth 38 *E.* 3. 6. cited before by *Bacon:* And also there the Prior was of the Order of the *Cistertians*; for if the Tithes originally belonged to the Parson, any Recompence for them shall not bar the Parson.

As to the last Precedent, the same was upon the Matter of a Custom of a *Modus Decimandi* for Wool: For to pay the Tithe of Corn or Hay in Kind, in Satisfaction of Corn, Hay and Wool, cannot be a Satisfaction for the Wool for the other Two were due of common Right; and all this appeareth in the Consultations themselves, which they shew but understand not. To which the Bishop of *London* said that the Words of the Consultation were, *Quod suggestio præd. materiaq; in eadem contenta minus sufficiens in Lege existit, &c.* so as *materia* cannot be referred to Form, and therefore it ought to extend to the *Modus Decimandi.*

* T

* To which I answered, That when the Matter is insufficiently or uncertainly alledged, the Matter it self faileth; for Matter ought to be alledged in good Sentence: And altho' the Matter be in Truth sufficient, yet if it were insufficiently alledged, the Plea wanteth Matter. And the Lord Treasurer said openly to them, that he admired that they would alledge such Things which made more against them than any Thing which had been said. And when the King relied upon the said Prohibition in the Register, when Land is given in Discharge of Tithes, the Lord Chancellor said, that that was not like to this Case; for there, by the Gift of the Land in Discharge of Tithes, the Tithes were actually discharged: But in the Case *de Modo Decimandi*, an annual Sum is paid for the Tithes, and the Land remains charged with the Tithes, but ought to be discharged by Plea *de Modo Decimandi*: All which was utterly denied by me; for the Land was as absolutely discharged of the Tithes *in casu de Modo Decimandi*, when an annual Sum ought to be paid, as where Land is given: For all the Records and Precedents of Prohibition in such Cases are, That such a Sum had been always, *&c.* paid *in plenam contentationem, satisfactionem & exonerationem omnium & singularum Decimarum, &c.* And although that the Sum be not paid, yet the Parson cannot sue for Tithes in Kind, but for the Money: For, as it hath been said before, the Custom and the said Acts of Parliament (where there is a lawful Manner of Tithing) hath discharged the Lands from Tithes in Kind, and prohibited, that no Suit shall be for them. And altho' that now (as it hath been said) the Parsons, *&c.* may sue in the Spiritual Court *pro Modo Decimandi*, yet without Question, at the first, the annual Payment of Money was as Temporal, as annual Profits of Lands were: All which the King heard with much Patience. And the Lord Chancellor answered not to that which I had answered him in, *&c.*

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Gibson's Codex 700. Watson's Clergyman 552 to 588.

And after that his most excellent Majesty, with all his Counsel, had for three Days together heard the Allegations on both Sides, He said, That he would maintain the Law of *England*, and that his Judges should have as great respect from all his Subjects as their Predecessors had had: And for the Matter, he said, that for any Thing that had been said on the Part of the Clergy, that he was not satisfied: And advised us his Judges to confer amongst our selves, and that nothing be encroached upon the Ecclesiastical Jurisdiction, and that they keep themselves within their lawful Jurisdiction, without unjust Vexation and Molestation done to his Subjects, and without Delay or Hindering of Justice. And this was the End of these three Days Consultations.

And note, That Dr. *Bennet* in his Discourse inveighed much against the Opinion in 8 *E.* 4. 14. and in my Reports in *Wright*'s Case, That the Ecclesiastical Judge would not allow a *Modus Decimandi*; and said, That that was the Mystery of Iniquity, and that they would allow it. And the King asked, for what Cause it was said in the said Books? To which I answered, that it appeareth in *Linwood*, who was Dean of the *Arches*, and of so profound Knowledge in the Canon and Civil Law, and who wrote in the Reign of King *Henry* the Sixth, a little before the said Case in 8 *E.* 4. in his Title *de Decimis*, *cap. Quoniam propter*, &c. *fol.* 139. *b. Quod Decimæ solvantur*, &c. *absq; ulla diminutione*: And in the Gloss it is said, *Quod Consuetudo de non Decimando, aut de non bene Decimando non valet.* And that being written by a great Canonist of *England*, was the Cause of the said saying in 8 *E.* 4. that they would not allow the said Plea *de Modo Decimandi*; for always the *Modus* * *Decimandi* is less in Value than the Tithes in specie, and then the same is against their Canon; *Quod decimæ solvantur absque diminutione, & quod consuetudo de non plene Decimando non valet.* And it seemed to the King, that that Book was a good Cause for them in the Time of King *Edward* the Fourth to say, as they had said; but I said, That I did not rely upon that, but upon the Grounds aforesaid, (*scil.*) The Common Law, Statute Laws, and the continual and infinite Judgments and judicial Proceedings; and that if any Canon or Constitution be against the same, such Canon and Constitution, &c, is void by the Statute of 25 *H.* 8. *cap.* 19. which see and note: For all Canons, Constitutions, &c. against the Prerogative of the King, the common Laws, Statutes, or Customs of the Realm are void.

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Antea 13, 15, 17.

Antea 17.

Lastly, the King said; That the High Commission ought not to meddle with any Thing but that which is enormous and exorbitant, and cannot permit the ordinary Process of the Ecclesiastical Law; and which the same Law cannot punish. And that was the Cause of the Institution of the same Commission, and therefore, although every Offence, *ex vi termini*, is enormous, yet in the Statute it is to be intended of such an Offence, as is *extra omnem normam*, as Heresy, Schism, Incest, and the like great Offences: For the King said, That it was not Reason that the High Commission should have Conusance of common Offences, but to leave them to Ordinaries, *scil.* because that the Party cannot have an Appeal in Case the High Commission shall determine of it. And the King thought that two High Commissions, for either Province one, should be sufficient for all *England*, and no more.

High Commission.
Antea 9, 10. 12 Co. 51 to 55. 84 to 89. Gibson's Codex 50, 54, 56, 58, 59, &c.

XV. *Mich.*

XV. *Mich.* 39 & 40 Eliz.

In the King's Bench.

Bedell *and* Sherman's *Case.*

Subſtraction of Tithes. Gibſon's Codex 718, &c. 826. ant. 23.

MICH. 39 & 40 *Eliz.* which is entred *Mich.* 40 *Eliz.* in the Common Pleas, *Rot.* 699. *Cantabr.* the Caſe was this; *Robert Bedel*, Gent. and *Sarah* his Wife, Farmers of the Rectory of *Litlington* in the County of *Cambridge*, brought an Action of Debt againſt *John Sherman*, in the Cuſtody of the Marſhal of the Marſhalſea, and demanded 550 *l.* and declared, that the Maſter and Fellows of *Clare-hall* in *Cambridge*, were ſeiſed of the ſaid Rectory in Fee, in Right of the ſaid College, and in *June* 10. 29 *Eliz.* by Indenture demiſed to *Chriſtopher Pheſant* the ſaid Rectory for 21 Years, rendering 17 *l.* 15 *s.* 5 *d.* and reſerving Rent-corn according to the Statute, *&c.* which Kent was the ancient Rent, who entered into the ſaid Rectory, and was poſſeſſed, and aſſigned all his Intereſt thereof to one *Matthew Batt*, who made his laſt Will and Teſtament, and made *Sarah* his Wife his Executrix, and died; *Sarah* proved the Will, and entered, and was thereof poſſeſſed as *Executrix*, and took to Huſband the ſaid *Robert Bedel*, by Force whereof, they in the Right of the ſaid *Sarah* entered, and were poſſeſſed thereof; and that the Defendant was then Tenant, and ſeiſed for his Life of 300 Acres of arable Lands in *Litlington* aforeſaid, which ought to pay Tithes to the Rector of *Litlington*; and in *anno* 38 *Eliz.* the Defendant *grano ſeminavit* 200 Acres, Parcel, *&c.* And that the Tithes of the ſame did amount to 150 *l.* and that the Defendant did not divide nor ſet forth the ſame from the 9 Parts, but took and carried them away, againſt the Form and Effect * of the Statute of 2 *E.* 6, *&c.* And the Defendant pleaded *Nihil debet*, and the Jury found that the Defendant did owe 55 *l.* and to the Reſidue they found, *Nihil debet*, *&c.* and in Arreſt of Judgment, divers Matters were moved.

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1. That *Grano seminata* is too general and incertain, but it ought to be expressed with what Kind of Corn the same was sowed.

Ant. 14.
1 Dany. 223.

2. It was moved, If the Parson ought to have the treble Value, the Forfeiture being by express Words limited to none by the Act, or that the same did belong to the Queen.

3. If the same did belong to the Parson, if he ought to sue for the same in the Ecclesiastical Court, or in the King's Temporal Court.

4. If the Husband and Wife should join in the Action, or the Husband alone should have the Action, and upon solemn Argument at the Bar and at the Bench, the Judgment was affirmed.

XVI. *Trin.* 7 Jac.

In the Court of Wards.

John Bailie's *Case.*

Diem clausit extremum.
12 Co. 102.
8 Co. 168.

IT was found by Writ of *Diem clausit extremum*, That the said *John Bailie* was seised of a Messuage or Tenement, and of and in the fourth Part of one Acre of Land, late Parcel of the Demesne Lands of the Manor of *Newton*, in the County of *Hereford*, in his Demesne as of Fee, and found the other Points of the Writ; and it was holden by the two Chief Justices, and the Chief Barons.

1 Sal. 169.

1. That *Messuagium, vel Tenementum*, is uncertain; for *Tenementum* is *nomen collectivum*, and may contain Land, or any Thing which is holden.

Post. 59, 72.

2. It was holden, that it was void for the Whole, because that no Town is mentioned in the Office where the Messuage or Tenement, or the fourth Part of the Acre lieth; and from the Visne of the Manor upon a Traverse none can come, because it is not affirmed by the Office, that they are Parcel of the Manor, but *super* Parcel of the Manor, which implieth, that now they are not, and it was holden by them, that no *Melius inquirendum* shall issue forth, because that the whole Office is incertain and void.

8 Co. 168.
Post. 72.

XVII. *Trin.*

XVII. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

Covenant to Uſes.

THE Attorney of the Court of Wards moved the two Chief Juſtices and Chief Baron in this Caſe, That a Man ſeiſed of Lands in Fee-ſimple, covenants for the Advancement of his Son, and of his Name, and Blood, and Poſterity, that he will ſtand ſeiſed of them, to the Uſe of himſelf for the Term of his Life, and after to the Uſe of his eldeſt Son, and to ſuch a Woman which he ſhall marry, and to the Heirs Males of the Body of the Son and afterwards the Father dieth, and after the Son taketh a Wife and dieth; if the Wife ſhall take an Eſtate for Life, and the Doubt was, becauſe the Wife of the Son was not within the Conſiderations, and the Uſe was limited to one who was capable, *ſcil.* the Son, and to another who was not capable, and therefore the Son ſhould take an Eſtate in Tail executed. But it was reſolved by the ſaid two Chief Juſtices and Chief * Baron, That the Wife ſhould take well enough; and as to the firſt Reaſon, they reſolved, That the Wife was within the Conſideration, for the Conſideration was for the Advancement of his Poſterity; and without a Wife, the Son cannot have Poſterity: Alſo when the Wife of the Son is ſure of a Jointure, the ſame is for the Advancement of the Son, for thereby he ſhall have the better Marriage. And as to the ſecond, it was reſolved, that the Eſtate of the Son ſhall ſupport the Uſe to the Defendant; and when the Contingent happeneth, the Eſtate of the Son ſhall be changed according to the Limitation, *ſcil.* to the Son and the Woman, and the Heirs of the Body of the Son: And ſo it was reſolved in the King's Bench by *Popham* Chief Juſtice, and the whole Court of the King's Bench, in the Reign of Queen *Eliz.* in *Sheffield*'s Caſe, for both Points.

4 Mod. 153. 2 Sal. 675. 10 679. 1 Vent. 137, 138. &c. Uſes. Vide poſt. 50. 55 Parliament Caſes 104.

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XVIII. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

SPARY's *Case.*

Office. Mean Profits, vide infra. 3 Inst. 216. 4 Inst. 196, 197, 299, 200, 207. 4 Co. 54. 7 Co. 21. 8 Co. 133. 10 Co. 114, 115.

JOHN Spary seised in Fee in the Right of his Wife of Lands holden of the Crown by Knight's Service, had Issue by her, and 22 *Decemb. anno* 9 *Eliz.* aliened to *Edward* Lord *Stafford*; the Wife died, the Issue of full Age, the Lands continue in the Hands of the Alienee, or his Assigns; and ten Years after the Death of the Father, and twelve Years after the Death of the Mother, Office is found, 7 *Jacobi*, finding all the special Matter after the Death of the Mother; the Question was, Whether the mean Profits are to be answered to the King? And it was resolved by the said two Chief Justices and the Chief Baron, that the King should not have the mean Profits, because that the Alienee was in by Title; and until Entry the Heir hath no Remedy for the mean Profits, but that the King might seise and make a Livery, because that the Entry of the Heir is lawful by the Statute of 32 *H.* 8.

XIX. *Trin.* 7 Jac. *Regis.*

In the Court of Wards.

Office, &c. 3 Inst. 216. 4 Inst. 196, 197, 200. Vide supra, & 2 Co. 93, 94. 5 Co. 31, 34, 66. 8 Co. 76. 8 Co. 164, 165, 173. 9 Co. 126, 132. 10 Co. 80, 81, &c.

IT was found by Force of a *Mandamus* at *Kendal* in the County of *Westmorland* the 21st of *December*, 6 *Jacobi Regis*, That *George* Earl of *Cumberland*, long before his Death, was seised in Tail to him and to the Heirs Males of his Body, of the Castles and Manors of *Browham*, *Appleby*, &c. the Remainder to Sir *Ingram Clifford*, with

with divers Remainders over in Tail; the Remainder to the right Heirs of *Henry* Earl of *Cumberland*, Father of the ſaid *George*; and that the ſaid *George*, Earl, ſo ſeiſed by Fine and Recovery, coveyed them to the Uſe of himſelf and *Margaret* his Wife for their Lives, for the Jointure of the ſaid *Margaret*; and afterwards to the Heirs Males of the Body of *Geo.* Earl of *Cumberland*, and for Want of ſuch Iſſue to the Uſe of *Francis* now Earl of *Cumberland*, and to the Heirs Males of his Body begotten; and for Want of ſuch Iſſue, to the Uſe of the right Heirs of the ſaid *George*; and afterwards, by another Indenture, conveyed the Fee-ſimple to *Francis*, Earl; by Force of which, and of * the Statute of Uſes they were ſeiſed accordingly: And afterwards, 30 *Octob. anno* 3 *Jacobi*, the ſaid *George* Earl of *Cumberland* died without Heir Male of his Body lawfully begotten: And further found, that *Margaret*, Counteſs of *Cumberland*, that now is, was alive, and took the Profits of the Premiſſes from the Death of the ſaid *George* Earl of *Cumberland* until the Taking of that Inquiſition; and further found the other Points of the Writ. *Page* [50]

And firſt it was objected, that here was no Dying ſeiſed found by Office, and therefore the Office ſhall be inſufficient: But as to that it was anſwered and reſolved, That by this Office the King was not intitled by the Common Law, for then a Dying ſeiſed, or at leaſt a Dying the Day of his Death was neceſſary: But this Office is to be maintained upon the Statute of 32 and 34 *H.* 8. by Force of which no Dying ſeiſed is requiſite, but rather the contrary, *ſcil.* if the Land be (as this Caſe is) conveyed to the Wife, *&c.* And ſo it was reſolved in *Vincent's* Caſe, *anno* 23 *Eliz.* where all the Lands holden *in Capite* was conveyed to the younger Son, and yet the eldeſt Son was in Ward, notwithſtanding that nothing deſcended. Vide poſt. 72. ant. 48. Stat. 32 H. 8. c. 1. & 34 H. 8. c. 5. See 2 Co. 93, 94, &c.

The ſecond Objection was, It doth not appear that the Eſtate of the Wife continued in her until the Death of the Earl, for the Husband and Wife had aliened the ſame to another; and then no primer Seiſin ſhall be, as it is agreed in *Bingham's* Caſe,

As to that, it was anſwered and reſolved, That the Office was ſufficient *prima facie* for the King, becauſe it is a Thing collateral, and no Point of the Writ; and if any ſuch Alienation be (which ſhall not be intended) then the ſame ſhall come in of the other Part of the Alienee by a *Monſtrans de droit*; and the Caſe at Bar is a ſtronger Caſe, becauſe it is found, that the ſaid Counteſs took the Profits of the Premiſſes from the Death of *George* the Earl, until the Finding of the Office. See 1 Co. 50, 53, 158, 173. 4 Co. 54, &c. 7 Co. 16, &c.

XX. *Trin.* 7 Jac.

In the Court of Wards.

Wills's *Case.*

Uſes.
1 Co. 121, 127, 140.
2 Co. 57, 58.
6 Co. 64.
7 Co. 13 & 34.
Vide ant. 48.
poſt. 55, 56.

HEnry Wills, being ſeiſed of the fourth Part of the Manor of *Wryland* in the County of *Devon*, holden of Queen *Elizabeth* in Socage-tenure *in Capite* of the ſaid fourth Part enfeoffed *Zachary Iriſh* and others, and their Heirs, to the Uſe of the ſaid *Henry* for the Term of his Life, and afterwards to the Uſe of *Tho. Wills* his 2d Son in Tail, and afterwards to the Uſe of *Richard Wills* his youngeſt Son in Tail; and for Deſault of ſuch Iſſue, to the Uſe of the right Heirs of the ſaid *Henry*; and afterwards the ſaid *Henry* ſo ſeiſed as aboveſaid died thereof ſeiſed; *William Wills* being his Son and Heir of full Age; *Thomas* the ſecond Son entered as into his Remainder: All this Matter is found by Office, and the Queſtion was If the King ought to have primer Seiſin in this Caſe and that Livery or *Ouſter le main* ſhall be ſued in this Caſe by the Statutes of 32 and 34 *H.* 8. And it was reſolved by the two Chief Juſtices and the Chief Baron, that not; if in this Caſe by the Common Law no Livery or *Ouſter le main* ſhall be ſued; and that was agreed by them all by the Experience and Courſe of the Court. So 21 *Eliz. Dyer* 362. If Tenant in Socage dieth ſeiſed in *Poſſeſſion, his Heir within the Age of fourteen Years, he ſhall not ſue Livery, but ſhall have an *Ouſter le main una cum exitibus*; but otherwiſe it is, if the Heir be of the Age of fourteen Years, which is his full Age for Socage; and therewith agreeth 4 *Eliz. Dyer* 213.

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And two Precedents were ſhewed, which were decreed in the ſame Court by the Advice of the Juſtices Aſſiſtants to the Court.

One in *Trinity* Term, 16 *Eliz. Thomas Stavely* the Father enfeoffed *William Strelly* and *Thomas Law*

the Manor of *Ryndly* in the County of *Nottingham*, upon Condition that they re-enfeoff the Feoffor and his Wife for their Lives, the Remainder to *Thomas Stavely* Son and Heir apparent of the Feoffor in Fee, which Manor was holden of Queen *Elizabeth* in Socage *in Capite*: And upon Conſideration of the Saving in the Statute of 32 *H.* 8. next after the Clauſe concerning Tenure in Socage in Chief, it was reſolved, That no Livery or *Ouſter le main* ſhould be ſued in ſuch Caſe, and the Reaſon was, becauſe that the precedent Clauſe giveth Liberty to him who holdeth in Socage in Chief, to make Diſpoſition of it, either by Act executed, or by Will at his free Will and Pleaſure: And before the ſaid Act, no Livery or *Ouſter le main* ſhould be ſued in ſuch Caſe: And the Words of the Saving are, ſaving, *&c.* to the King, *&c.* all his Right, *&c.* of primer Seiſin and Relief, *&c.* for Tenure in Socage, or of the Nature of Tenure in Socage in Chief, as heretofore hath been uſed and accuſtomed: But there was no Uſe or Cuſtom before the Act, that the King ſhould have any primer Seiſin or Relief in ſuch Caſe: And the Words ſubſequent in the ſaid Saving depend upon the former Words, and do not give any primer Seiſin or Relief where none was before.

Another Precedent was in *Paſch.* 37 *Eliz.* in the Book of Orders, *fol.* 444. where the Caſe was, that *William Allett* was ſeiſed of certain Lands in *Pitſey* called *Lundſey*, holden of the Queen in Socage in Chief, and by Deed covenanted to ſtand ſeiſed to the Uſe of his Wife for Life, and afterwards to the Uſe of *Richard* his younger Son in Fee, and died, his Heir of full Age; and all that was found by Office, and it was reſolved, *ut ſupra*, That no Livery or *Ouſter le main* ſhould be ſued in that Caſe; but the Doubt in the Caſe at Bar was, becauſe that *Henry* the Feoffor had a Reverſion in Fee, which deſcended to the ſaid *William* his eldeſt Son.

XXI. *Trin.*

XXI. *Trin. Anno* 7 Jacobi *Regis.*

The Case of the Admiralty.

Admiralty.
See 12 Co. 129, &c. ibid.
2 Co. 93.
10 Co. 115, 117.
5 Co. 2.
Part 106, 108.

A Bill was preferred in the Star-chamber againſt Sir *Richard Hawkins*, Vice-admiral of the County of *Devon*; and was charged, that one *William Hull* and others were notorious Pirates upon the High Seas, and ſhewed in certain, what Piracy they had committed: The ſaid Sir *Richard Hawkins* knowing the ſame, did them receive, abet and comfort within the Body of the County, and for Bribes and Rewards ſuffered them to be diſcharged. And what Offence that was, the Court referred to the Conſideration of the two Chief Juſtices and the Chief Baron, who heard Counſel of both Sides divers Days at Serjeants Inn.

12 Co. 129.

And firſt, it was by them reſolved, that by the Common Law the Admirals ought not to meddle with any Thing done within the Realm, but only with Things done upon the Sea; and that appeareth fully by * the Statute of 15 *R.* 2. *cap.* 5. by which it appeareth, that ſuch was the Common Law in the Time of King *Edward* the Third, and therewith agreeth the Statute of 2 *Hen.* 4. *cap.* 11. and the Statute of 15 *Hen.* 2. *cap.* 3. That becauſe the Admirals and their Deputies incroach to themſelves divers Juriſdictions and Franchiſes more than they ought to have, Be it enacted, That all Contracts, Pleas and Complaints, and all other Things ariſing within the Bodies of the Counties as well by Land as by Water, as alſo of Wreck of the Sea, the Admiral Court ſhall not have any Conuſance, Power, or Juriſdiction, *&c.* Nevertheleſs of the Death of a Man, and of Mayhem done in great Ships, being in the main Stream of great Rivers, only below the Bridges nigh to the Sea, and not in

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the

ther Places of the same Rivers; and to arrest Ships in the great Flotes for the great Voyage of the King and of his Realm: And by the Statute of 2 *Hen.* 5. *cap.* 6. the Admirals of the King of *England* have done and used reasonably, according to the ancient Law and Custom, upon the main Sea. See the Statute of 5 *Eliz. cap.* 5. And all this appeareth to be by the Common Law; and with that agreeth *Stamford fol.* 51. And if a Man be killed or slain within the Arms of the Sea, where a Man may see from the one Part of the Land to the other, the Coroner shall enquire of it, and not the Admiral, because that the Country may well know it: And he voucheth 8 *Ed.* 2. *Coron.* 399. so saith *Stamford*, the same proves that by the Common Law before the Statute of 2 *H.* 4. *cap.* 11. the Admiral shall not have Jurisdiction unless upon the High Sea. See *Pla. Com.* 37. 6. If the Marshal holdeth Plea out of the Verge, or the Admiral within the Body of the County, the same is void. See 2 *R.* 3. 12. 30 *H.* 6. 6. by *Prisoit.*

2. It was resolved, That the said Statutes are to be intended of a Power to hold Plea, and not of a Power to award Execution, *scil. De Jurisdictione tenendi placiti; non de Jurisdictione exequendi*: For notwithstanding the said Statutes, the Judge of the Admiralty may do Execution within the Body of the County; and therefore in 19 *H.* 6. 7. the Case was, *W. T.* at *Southwark* affirmed a Plaint of Trespass in the Court of Admiralty before the Steward of the Earl of *Huntington* against *J. B.* of a Trespass done upon the High Sea, upon which issued a Citation to cite the said *J. B.* to appear before the Steward aforesaid at the common Day then next ensuing, directed to *P.* who served the said Citation; at which Day the said *J. B.* made Default: And the Usage of the Court is, that if the Defendant maketh Default, he shall be amerced by the Discretion of the Steward, to the Use of the Plaintiff: The which *J. B.* for his Default aforesaid, was amerced to twenty Marks; whereupon Command was made to the said *P.* as Minister of the Court aforesaid, to take the Goods of the said *J. B.* to make Agreement with the beforesaid *W. T.* by Force of which he for the said twenty Marks took five Cows, and an hundred Sheep, in Execution for the Money aforesaid, in the County of *Leicester*. And there it is holden by *Newton*, and the whole Court, that the Statutes restrain the Power of the Court of Admiralty

ralty to hold Plea of a Thing done within the Body of the County, but they do not restrain the Execution of the same Court to be served upon the Land: For it may be that the Party hath not any Thing upon the Sea, and then it is Reason to have it upon the Land: And if such a Defendant have nothing wherewithall to make Agreement, they of the Court have Power to take the Body of such a Defendant upon the Land in Execution.

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* In which Case these Points were observed:

1. Although that the Court of Admiralty is not a Court of Record, because they proceed there according to the Civil Law, (see *Brook*, *Error* 77. *acc.*) yet by Custom of the Court they may amerce the Defendant for his Default by their Discretion.

2. That they may make Execution for the same of the Goods of the Defendant *in corpore Comitatus*: And if he hath not Goods, then they may arrest the Body of the Defendant within the Body of the County.

See this Point resolved 8 El. Dyer per curiam, which is omitted out of the printed Book.

But the great Question between them was, If a Man committed Piracy upon the Sea, and one knowing thereof, receiveth and comforteth the Defendant within the Body of the County; if the Admiral and other the Commissioners, by Force of the Act of 28 *H.* 8. *cap.* 16. may proceed by Indictment and Conviction against the Receiver and Abettor, in as much as the Offence of the Accessary hath his Beginning within the Body of the County?

And it was resolved by them, that such a Receiver and Abettor by the Common Law could not be indicted or convicted, because that the Common Law cannot take Conusance of the original Offence, because that is done out of the Jurisdiction of the Common Law: And by Consequence where the Common Law cannot punish the Principal, the same shall not punish any one as Accessary to such a Principal. And therefore *Coke* Chief Justice reported to them a Case which was in *Suffolk* in *Anno* 28 *Eliz.* where *Butler* and others upon the Sea, next to the Town of *Laystoft* in *Suffolk*, robbed divers of the Queen's Subjects, and spoiled them of their Goods, which Goods they brought into *Norfolk*; and there they were apprehended, and then brought before me, then a Justice of the Peace within the same County, whom I examined; and in the End they confessed a cruel and barbarous Piracy, and that the Goods which then they had with them, were Part of the Goods which they had robbed from the Queen's Subjects upon the High Sea: And I was of Opinion, that in this Case it could not be Felony punishable by the Common Law, because that the original Act, (*scil.*) the Taking

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them, was not any Offence whereof the Common Law taketh Knowledge; and by Consequence, the Bringing of them into a County could not make the same Felony punishable by our Law: And it is not like, where one stealeth Goods in one County, and brings them into another, there he may be indicted of Felony in any of the Counties, because that the original Act was Felony, whereof the Common Law taketh Knowledge: And yet notwithstanding I committed them to the Gaol, until the Coming of the Justices of Assises. And at the next Assises the Opinion of *Wray* Ch. Justice, and *Periam* Justices of Assise, was that for as much as the Common Law doth not take Notice of the original Offence, the Bringing of the Goods stoln upon the Sea into a County, did not make the same punishable at the Common Law: And thereupon they were committed to Sir *Robert Southwell*, then Vice-Admiral of the said Counties: And this in Effect agrees with *Lacy*'s Case, which see in my *Reports* cited in *Bingham*'s Case in the 2 *Reports* 93. and in *Constable*'s Case, *C.* 3. *Reports* 107.

See that Piracy was Felony, the Book of 40 *Assis.* 25. by *Shard.* where a *Norman* Master or Capt. of a Ship, together with some *Englishmen*, robbed the King's Subjects upon the Seas; where he saith, that it was Felony in the *Norman* Captain, and Treason in the *Englishmen* his Companions: And the Reason of the said Case was, because the *Normans* were not then under the Obedience and Allegiance of the King * of *England* (for King *John* lost *Normandy*) and for that Cause Piracy was but Felony in the *Norman*; but in the *English* who were under the Obedience and Allegiance of the King of *England*, the same was adjudged Treason, which is to be understood of Petit Treason, which was High Treason before: And therefore in that Case, the Pirate being apprehended, the *Norman* Captain was hanged, and the *English* Men were hanged and drawn, as appeareth by the same Book. See *Stamford* 10. Page [54]

And some objected, and were of Opinion, That Treasons done out of the Realm might have been here determined by the Common Law; but truly the same could not be punishable, but only by the Civil Law before the Admiral, or by Act of Parliament, as all Foreign Treasons and Felonies were by the Common Law: And therefore where it is declared by the Statute of 25 *E.* 3. That Adherence to the Enemies of the King within *England*, or elsewhere, is Treason, the same shall be tried by the Common Law: But where it is done out of the Realm, the Offender shall not be attainted but by Parliament, until the Statute of 35 *H.* 8. *cap.* 2. although that there are Opinions

ons in ſome Books to the contrary. See 5 *R.* 2. *Quare Impedit, &c.*

XXII. *Trin.* 7 Jac. *Regis.*

In the Common Pleas.

Pettus *and* Godſalve's *Caſe.*

Fine, Proclamations amended. 4 Co. 42. See 5 Co. 2. Part 28, 39, 43, 44, and 45. 8 Co. 157, to 161.

IN a Fine levied *Trinity-Term*, *Anno quinto* of this King, between *John Pettus*, Eſq; Plaintiff, and *Roger Godſalve* and others, Deforceants of the Manor of *Caſtre*, with the Appurtenances, *&c.* in the County of *Norfolk*, where in the third Proclamation upon the Foot of the ſame Fine the ſaid Proclamation is ſaid to have been made in the ſixth Year of the King that now is, which ought to have been *Anno quinto* of the King: And whereas upon the Foot of the ſame Fine, the fourth Proclamation is altogether left out; but becauſe upon the View of the Proclamations upon *Dorſis*, upon Record, & *Nota finis ejuſdem Termini per Juſticiarios*, remaining with the Chirographer, and the Book of the ſaid Chirographer, in which the ſaid Proclamations were firſt entered, it appeareth, that the ſaid Proclamations were rightly and duely made, therefore it was adjudged, that the Errors or Defects aforeſaid ſhould be amended, and made to agree as well with the Proclamation upon Record of the ſaid Fine and Entry of the ſaid Book, as with the other Proclamations *in Dorſis ſuper pedes aliorum finium* of the ſame Term. And this was done upon the Motion of *Haughton*, Serjeant at Law.

XXIII. *Mich*

XXIII. *Mich.* 7 Jac. *Regis.*

In the Court of Wards.

Sammes's *Case.*

John Sammes being ſeiſed of *Grany* Mead by Copy of Court-Roll of the Manor of *Tolleſham* the Great, of which Sir *Thomas Beckingham*, &c. and held the ſame of the King by Knights Service *in capite*; Sir *Thomas* by his Deed indented, dated the 22d of *December*, in the * firſt Year of King *James*, made between him of the one Part, and the ſaid *John Sammes* and *George Sammes* Son and Heir apparent of the ſaid *John* of the other Part, did bargain, ſell, grant, enfeoff, releaſe, and confirm unto the ſaid *John Sammes* the ſaid Mead called *Grany* Mead, to have and to hold the ſaid Mead unto the ſaid *John Sammes* and *George Sammes*, and their Heirs and Aſſigns, to the only Uſe and Behoof of the ſaid *John Sammes* and *George Sammes*, their Heirs and Aſſigns for ever: And by the ſame Indenture Sir *Thomas* did covenant with *John* and *George*, to make further Aſſurance to *John* and *George*, and their Heirs, to the Uſe of them and their Heirs, and Livery and Seiſin was made and delivered, according to the true Intent of the ſaid Indentures, of the within mentioned Premiſſes to the Uſes within mentioned.

Uſes. See 1 Co. 101, 121, 122, 127, 140. 2 Co. 58, 78. 6 Co. 64. 7 Co. 13 and 31. *Page* [55] Vide ant. 50, 51. Uſes. Vide ant. 48, 50, 54.

John Sammes the Father dieth, *George Sammes* his Son and Heir being within Age, the Queſtion was, Whether *George Sammes* ſhould be in Ward to the King or no? And in this Caſe three Points were reſolved:

Wardſhip.

1. For as much as *George* was not named in the Premiſſes, he cannot take by the *Habendum*; and the Livery made according to the Intent of the Indenture, doth not give any Thing to *George*, becauſe the Indenture as to him is void: But although the Feoffment be good only to *John* and his Heirs, yet the Uſe limited to the Uſe of *John* and *George*, and their Heirs, is good.

Habendum.

2. If the Estate had been conveyed to *John* and his Heirs by the Release or Confirmation, as it well may be to a Tenant by Copy of Court-Roll, the *Use* limited to them is good: For upon a Release which creates an Estate, a Use may be limited, or a Rent reserved without Question; but upon a Release or Confirmation, which enures by way of *Mitter le droit*, an Use cannot be limited, or a Rent reserved.

Uses.

Joint-Tenants, &c.

But the Third was of greater Doubt, if in this Case the Father and Son were Joint-Tenants, or Tenants in Common? For it was objected, when the Father is only enfeoffed to the only Use of him and his Son, and their Heirs in the *Per*, that in this Case, they shall be Tenants in Common. By the Feoffment the Father is in by the Common Law in the *Per*, and then the Limitation of the Use to him and his Son, and to their Heirs, cannot devest the Estate, which was vested in him by the Common Law, out of him, and vest the Estate in him in the *Post* by Force of the Statute, according to the Limitation of the Use: And therefore, as to one Moiety, the Father shall be in by Force of the Feoffment in the *Per*, and the Son, as to the other Moiety, shall be in by Force of the Statute, according to the Limitation of the Use in the *Post*, and by Consequence they shall be Tenants in Common. But it was answered and resolved, That they were Joint-Tenants, and that the Son in the Case at Bar should have the said Grange by the Survivor: For if at the Common Law *A.* had been enfeoffed to the Use of him and *B.* and their Heirs, although that he was only seised of the Land, the Use was jointly to *A.* and *B.* For a Use shall not be suspended or extinct by a sole Seisin, or Joint Seisin of the Land: And therefore if *A.* and *B.* be enfeoffed to the Use of *A.* and his Heirs, and *A.* dieth, the entire Use shall descend to his Heir: As it appears in 13 *H.* 7. 6. in *Stoner's* Case: And by the Statute of 27 *H.* 8. *cap.* 10. of Uses, it appeareth, That when several Persons are seised to the Use of any of them, that the Estate shall be executed according to the Use.

And as to that which was said, That the Estate of the Land which the Father hath in the Land, as to the Moiety of the Use which he himself* hath, shall not be devested out of him: To that it was answered and resolved, That that shall well be: For if a Man maketh a Feoffment in Fee to one, to the Use of him and the Heirs of his Body, in this Case, for the Benefit of the Issue, the Statute according to the Limitation of the Uses, devests the Estate vested in him by the Common Law, and executes the same

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in himself by Force of the Statute; and yet the same is out of the Words of the Statute of 27 *H.* 8. which are, Where any Person, *&c.* stand or be seised, *&c.* to the Use of any other Person; and here he is seised to the Use of himself: And the other Clause is, Where divers and many Persons, *&c.* be jointly seised, *&c.* to the Use of any of them, *&c.* and in this Case *A.* is sole seised: But the Stat of 27 *H.* 8. hath been always beneficially expounded, to satisfy the Intention of the Parties, which is the Direction of the Use according to the Rule of the Law. So if a Man, seised of Lands in Fee-simple, by Deed covenant with another, that he and his Heirs will stand seised of the same Land, to the Use of himself and the Heirs of his Body, or unto the Use of himself for Life, the Remainder over in Fee; in that Case, by the Operation of the Statute, the Estate which he hath at the Common Law is devested, and a new Estate vested in himself, according to the Limitation of the Use. And it is to be known, that an Use of Land (which is but a Pernancy of the Profits) is no new Thing, but Part of that which the Owner of the Land had: And therefore, if Tenant in *Borrough English*, or a Man seised of the Part of his Mother, maketh a Feoffment to another without Consideration, the younger Son in the one Case, and the Heir on the Part of the Mother on the other, shall have the Use, as they should have the Land it self, if no Feoffment had been made: As it is holden in 5 *E.* 4. 7. See 4 & 5 *Phil. & Mar. Dyer* 163. So if a Man maketh a Feoffment unto the Use of another in Tail, and afterwards to the Use of his right Heirs, the Feoffor hath the Reversion of the Land in him; for if the Donee dieth without Issue, the Law giveth the Use, which was Part of the Land to him: And so it was resolved, *Trinity*, 31 *Eliz.* between *Fenwick* and *Milford* in the King's Bench. So in 28 *H.* 8. *Dyen* 11. the Lord *Rosse*'s Case: A Man seised of one Acre by Priority, and of another Acre by Posteriority, and make a Feoffment in Fee of both to his Use: And it was adjudged, that although both pass at one Instant, yet the Law shall make a Priority of the Uses, as if it were of the Land it self: Which proves, that the Use is not any new Thing, for then there should be no Priority in the Case. See 13 *H.* 7. *b.* by *Butler*.

So in the Case at Bar, The Use limited to the Feoffee and another, is not any new Thing, but the Pernancy of the old Profits of the Land, which well may be limited to the Feoffee and another jointly: But if the Use had been only limited to the Feoffee and his Heirs, there, because there is not any Limitation to another Person, *nec in presenti*,

See the D. of Norfolk's Case in 3 Chanc. Ca.

senti, nec in futuro, he shall be in by Force of the Feoffment.

And it was resolved, That Joint-Tenants might be seised to an Use, although that they come to it at several Times: As, if a Man maketh a Feoffment in Fee to the Use of himself, and to such a Woman, which he shall after marry, for Term of their Lives, or in Tail, or in Fee; in this Case, if after he marrieth a Wife, she shall take jointly with him, although that they take the Use at several Times, for they derive the Use out of the same Fountain and Freehold, *scil.* the Feoffment. See 17 *El. Dyer* 340. So if a Disseisin be had to the Use of two, and one of 'em agreeth at one Time, and the other at another Time, they shall * be Joint-Tenants; but otherwise it is of Estates which pass by the Common Law: And therefore if a Grant be made by Deed to one Man for Term of Life, the Remainder to the Right Heirs of *A.* and *B.* in Fee, and *A.* hath Issue and dieth, and afterwards *B.* hath Issue and dieth, and then the Tenant for Life dieth; in that Case the Heirs of *A.* and *B.* are not Joint-Tenants, nor shall join in a *Sci' Fac'* to execute the Fine, 24 *E.* 3. *Joinder in Action* 10. because that altho' the Remainder be limited by one Fine, and by Joint Words, yet because that by the Death of *A.* the Remainder as to the Moiety, vested in his Heir, and by the Death of *B.* the other Moiety vested in his Heir at several Times, they cannot be Joint-Tenants: But in the Case of a Use, the Husband taketh all the Use in the mean Time; and when he marrieth, the Wife takes it by Force of the Feoffment and the Limitation of the Use jointly with him, for there is not any Fraction and several vesting by Parcels, as in the other Case, and such is the Difference. See 18 *E.* 3. 28. And upon the whole Matter it was resolved, That because in the principal Case the Father and Son were Joint-Tenants by the original Purchase, that the Son having the Land by Survivor, should not be in Ward: And accordingly it was so decreed.

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XXIV. *Pasch*

XXIV. *Paſch.* 39 El. *Rot.* 233.

In the King's Bench.

Collins *and* Harding's *Caſe.*

THE Caſe between *Collins* and *Harding* was, a Man ſeiſed of Lands in Fee, and alſo of Lands by Copy of Court-Roll in Fee, according to the Cuſtom of the Manor, made one entire Demiſe of the Lands in Fee, and of the Lands holden by Copy according to the Cuſtom, to *Harding* for Years, rendering one entire Rent: And afterwards the Leſſor ſurrendered the Copyhold Land to the Uſe of *Collins* and his Heirs: And at another Time granted by Deed the Reverſion of the Freehold Lands to *Collins* in Fee, and *Harding* attorned; and afterwards for the Rent behind, *Collins* brought an Action of Debt for the whole Rent: And it was objected, That the Reſervation of the Rent was an entire Contract, and by the Act of the Leſſee the ſame cannot be apportioned: And therefore if one demiſeth three Acres, rendering 3 *s.* Rent, and afterwards bargaineth and ſelleth, by Deed indented and inrolled, the Reverſion of one Acre, the whole Rent is gone, becauſe that the Contract is entire and cannot be ſevered by the Act of the Leſſor: Alſo the Leſſee by that ſhall be Subject to two Fealties, where he was ſubject but to one before.

Rent apportioned.
See 3 Co. 24.
4 Co. 37, 38.
5 Co. 2. Part 5, 6, 55.
6 Co. 2.
7 Co. 13.
8 Co. 79.
9 Co. 135.
10 Co. 128.

As to theſe Points, it was anſwered and reſolved, That the Contract was not entire, but that the ſame by the Act of the Leſſor, and the Aſſent of the Leſſee, might be divided and ſevered: For the Rent is incident to the Reverſion, and the Reverſion is ſeverable, and by Conſequence the Rent alſo: For *acceſſarium ſequitur naturam ſui principalis*, and that cannot be ſevered or divided by the Aſſent of the Leſſee, or expreſs Attornment, or implied by Force of an Act of Parliament, to which every one is a Party as by Force of the Statute of Inrolments, or of Uſes, *&c.* And as to the two Fealties, to that the Leſſee ſhall be ſubject, although that the Rent ſhall be extinct: For Fealty is by

Neceſſity of Law incident to the Reverſion, and to every Part of it; but the Rent ſhall be divided *pro rata portionis*: And ſo it was adjudged.

Page [58] * And it was alſo adjudged, That although *Collins* cometh to the Reverſion by ſeveral Conveyances, and at ſeveral Times, yet he might bring an Action of Debt for the whole Rent. *Hill.* 43 *Eliz. Rot.* 243. *Weſt* and *Laſſel*'s Caſe: A Man made a Leaſe for Years of certain Lands, and afterwards deviſeth the Reverſion of two Parts to one, he ſhall have two Parts of the Rent; and he may have an Action of Debt for the ſame, and have Judgment to recover. *Hill.* 42 *Eliz. Rot.* 108. in the Common Pleas, *Ewer* and *Moyl*'s Caſe: The Deviſee of the Reverſion of Part ſhall avow for Part of the Rent, and ſuch Avowry ſhall be good and maintainable.

Note well theſe Caſes and Judgments, for they are given upon great Reaſon and Conſideration, for otherwiſe great Inconvenience would enſue, if by Severance of Part of the Reverſion, the entire Rent ſhould be loſt: And the Opinion reported by Serjeant *Bonloes*, in *Hill.* 6. and 7 *E.* 6. to the contrary, *nihil valet (ſcil.)* That the Rent in ſuch Caſe ſhould be loſt, becauſe that no Contract can be apportioned, which is not Law: For, 1. A Rent reſerved upon a Leaſe for Years is more than a Contract, for it is a Rent-ſervice. 2. It is incident to the Reverſion which is ſeverable. 3. Upon Recovery of Part in Waſte, or upon Entry in Part for a Forfeiture, or upon Surrender of Part, the Rent is apportionable.

De Modo Decimandi.

Modus Decim. Antea 12, 37, 38, &c.

25. NOte; It was adjudged 19 *Eliz.* in the King's Bench, That where one obtained a Prohibition upon Preſcription *De Modo Decimandi*, by Payment of a certain Sum of Money at a certain Day; upon which Iſſue was taken, and the Jury found the *Modus Decimandi* by Payment of the ſaid Sum, but that it had been paid at another Day: And the Caſe was well debated, and at the laſt it was reſolved, That no Conſultation ſhould be granted; for although that the Day of Payment be Miſtaken, yet it appeareth to the Court, that no Tithes in Kind were due, for which the

Suit

Suit was in the Spiritual Court: And the Trial of the Cuſtom *De Modo Decimandi* belongeth to the Common Law, and a Conſultation ſhall not be granted where the Spiritual Court hath not Juriſdiction of the Cauſe: *Tanfield*, Chief Baron, hath the Report of this Caſe.

XXV. *Mich.* 7 Jacobi *Regis.*

Ejectment de duabus partibus, &c.

IN an *Ejectione Firmæ*, the Writ and Declaration were of two Parts of certain Lands in *Hetherſet* and *Windham* in *Norfolk*, and doth not ſay in two Parts, in three Parts to be divided; and yet it was good as well in the Declaration as in the Writ: For without Queſtion the Writ is good, *de duabus partibus*, generally, and ſo is the Regiſter. See 4 *E.* 3. 162. 2 *E.* 3. 31. 2 *Aſſiſ.* 1. 10 *Aſſiſ.* 12. 10 *E.* 3. 511. 11 *Aſſ.* 21. 11 *E.* 3. *Bre.* 478. 9 *H.* 6. 36. 17 *E.* 4. 46. 19 *E.* 3. *Bre.* 244. And upon all the ſaid Books it appeareth, that by the Intendment and Conſtruction of the Law, when any Parts are demanded without ſhewing in how many Parts the whole is divided, that there remains but one Part not divided: As if two Parts are demanded, there remains a third Part; and when three Parts are divided, there remains a fourth Part, &c. But when any Demand is of other Parts in other Form, there he ought to ſhew the ſame Specially: As if one demandeth three Parts of * five Parts, or four Parts of the ſix, &c. And according to this Difference it was ſo reſolved in *Jourden's* Caſe in the King's Bench; And accordingly Judgment was given in this Term in the Caſe at Bar.

See 3 Co 16. 45. 4 Co. 26, 95. 9 Co. 77, 78. 10 Co. 46. 11 Co. 25, 55, &c.

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XXVI. *Mich.* 7 Jac. *Regis.*

In the Common Pleas.

Mutton's *Case.*

Slander.
Postea 71.
3 Danv. 95, to 99.
See Inst. Leg. 291, 292.
1 Lev. 255, 276,
2 Brownl. 276.
Hob. 137, 155, 162.
1 Cro. 100.
2 Cro. 205, 233, 236, 306, 399, 531, 560.

AN Action upon the Case was brought against *Mutton*, for calling of the Plaintiff, *Sorcerer and Inchanter*, who pleaded *Not guilty*; and it was found against him to the Damages of 6 *d.* And it was holden by the whole Court in the Common Pleas, that no Action lieth for the said Words: For *Sortilegium est rei futuri per sortes exploratio: Et Sortilegus sive Sortilegista est qui per sortes futura prænunciat.* Inchantry *est verbis aut rebus adjunctis aliquid præter naturam moliri*: Whereof the Poet saith,

Carminibus Circes socios mutavit Ulyssis.

See 45 *E.* 3. 17. One was taken in *Southwark* with the Head and Visage of a dead Man, and with a Book of Sorcery in his Mail: And he was brought into the King's Bench before *Knevet* Justice, but no Indictment was framed against him: For which the Clerks made him swear, that he should never after commit any Sorcery; and he was sent to Prison? And the Head and the Book were burned at *Tuthil*, at the Charges of the Prisoner. And the ancient Law was, as it appeareth by *Britton*, that those who were attainted of Sorcery were burned: But the Law is not such at this Day; but he who is convicted of such Imposture and Deceit shall be fined and imprisoned. And it was said, that it was adjudged, That if one calleth another Witch, that an Action will not lie, for it is too general: *Et dicitur Latine Venefica*: But if one saith, She is a Witch, and hath bewitched such a one to Death, an Action upon the Case lieth, if in Truth he be dead. Conjuration is derived of these Words, *Con* and *juro*: *Et proprie dicitur quando multi in alicujus perniciem jurant*: And in the Statute of 5 *Eliz. cap.* 16. it is taken for Invocation of

of any evil and wicked Spirits, *i. eſt conjurare verbis conceptis aliquos malos & iniquos ſpiritus*; the ſame is made Felony: But Witchcraft, Inchantment, Charm or Sorcery, is not Felony, if by them any Perſon be not killed or dieth. So that Conjuration *eſt verbis conceptis compellere malos & iniquos ſpiritus aliquod facere vel dicere*, &c. But a Witch, who works any Thing by any evil Spirit, doth not make any Conjuration or Invocation by any powerful Names of the Devil, but the wicked Spirit comes to her familiarly, and therefore is called a Familiar: But if a Man be called a Conjurer, or a Witch, he ſhall not have any Action upon the Caſe, unleſs that he ſaith, That he is a Conjurer of the Devil, or of any Evil or wicked Spirit: Or, that one is a Witch, and that he hath bewitched any one to Death, as is before ſaid.

And note, That the firſt Statute which was made againſt Conjuration, Witchcraft, Sorcery and Inchantment, was the Act of 33 *H.* 8. *c.* 8. and by it they were made Felony in certain Caſes ſpecial, but that Act was repealed by the Statute of 1 *E.* 6. *cap.* 12.

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*XXVII. *Mich.* 7 Jac. *Regis*.

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In the Court of Wards.

Sir Allen Percy's *Case*.

SIR *John Fitz* and *Bridget* his Wife, being Tenants for Life of a Tenement called *Ramſhams*, the Remainder to Sir *John Fitz* in Tail, the Remainder to *Bridget* in Tail, the Reverſion to Sir *John* and his Heirs: Sir *John* and *Bridget* his Wife, by Indenture demiſed the ſaid Tenement to *Wm. Sprey* for divers Years yet to come, except all Trees of Timber, Oak and Aſhes, and Liberty to carry them away, rendering Rent, and afterwards Sir *John* died, having Iſſue *Mary* his Daughter, now the Wife of Sir *Allen Percy*, Kt. and afterwards the ſaid *Wm. Sprey* demiſed the ſame Tenement to Sir *Allen* for 7 Years: The Queſtion was, Whether Sir *Allen*, having the immediate Inheritance in the Right of his Wife, expectant upon the Eſtate

Waſte in cutting Trees, &c. See 2 Co. 92. 4 Co. 63, 67, to 70. 5 Co. 2. Part 12. 11 Co. 45, 48, 82.

Eſtate for the Life of *Bridget*, and alſo having the Poſſeſſion by the ſaid Demiſe, might cut down the Timber-Trees, Oaks, and Aſhes: And it was objected, that he might well do it: For it was reſolved in *Saunders*'s Caſe, in the fifth Part of my Reports, *fol.* 12. That if Leſſee for Years, or for Life, aſſigns over his Term or Eſtate unto another, excepting the Mines, or the Trees, or the Clay, *&c.* that the Exception is void, becauſe that he cannot except that which he cannot lawfully take, and which doth not belong unto him by the Law. But it was anſwered and reſolved by the two Chief Juſtices, and the Chief Baron, That in the Caſe at Bar, the Exception was good without Queſtion, becauſe that he who hath the Inheritance, joins in the Leaſe with the Leſſee for Life. And it was further reſolved, That if Tenant for Life leaſeth for Years, excepting the Timber-Trees, the ſame is lawfully and wiſely done: For otherwiſe, if the Leſſee or Aſſignee cutteth down the Trees, the Tenant for Life ſhould be puniſhed in Waſte, and ſhould not have any Remedy againſt the Leſſee for Years: And alſo if he demiſeth the Land without Exception, he who hath the immediate Eſtate of Inheritance, by the Aſſent of the Leſſee, may cut down all the Timber-Trees, which when the Term ended, all ſhould be waſted, and then the Tenant for Life ſhould not have the Boots which the Law giveth him, nor the Pawnage and other Profits of the ſaid Trees, which he lawfully might take: But when Tenant for Life upon his Leaſe excepteth the Trees, if they be cut down by the Leſſor, the Leſſee or Aſſignee ſhall have an Action of Treſpaſs, *Quare vi & armis*, and ſhall recover Damages according to his Loſs.

And this Caſe is not like the ſaid Caſe of *Saunders*, which was affirmed to be good Law; for there the Leſſee aſſigned over his whole Intereſt, and therefore could not except the Mines, Trees, and Clay, *&c.* which he had not but as Things annexed to the Land: And therefore he could not have them when he had parted with his whole Intereſt, nor he could not take them either for Reparations or otherwiſe: But when Tenant for Life leaſeth for Years, except the Timber-Trees, the ſame remaineth yet annexed to his Freehold, and he may command the Leſſee to take them for neceſſary Reparations of the Houſes. And in the ſaid Caſe of *Saunders*, a Judgment is cited between *Foſter* and *Miles* * Plaintiffs, and *Spencer* and *Bourd* Defendants, That where Leſſee for Years aſſigns over his Term, except the Trees, that Waſte in ſuch Caſe ſhall be brought againſt the Aſſignee, but in this Caſe without Queſtion Waſte lieth

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lieth against the Tenant for Life, and so there is a Difference, &c.

XXVIII. *Mich.* 7 Jac. *Regis.*

In the Court of Wards.

Hulme's *Case*.

THE King (in the Right of his Dutchy of *Lancaster*) Lord: *Richard Hulm* (seised of the Manor of *Male* in the County of *Lancaster*, holden of the King as of his Dutchy by Knights Service) Mesne: And *Rob. Male* seised of Lands in *Male*, holden of the Mesne as of his said Manor by Knights Service) Tenant. *Rich. Hulm* died; after whose Death, 31 *Hen.* 8. it was, that he died seised of the said Menalty, and that the same descended to *Edward* his Son and Heir within Age, and found the Tenure aforesaid, &c. And during the Time that he was within Age, *Rob. Male* the Tenant died; after which, *anno* 35 *H.* 8. it was found by Office, That *Robert Male* died seised of the said Tenancy peravail, and that the same descended to *Richard* his Son and Heir within Age, and that the said Tenancy was holden of the King, as of his said Dutchy, by Knights Service; whereas in Truth the same was holden of *Edward Hulm*, then in Ward of the King, as of his Menalty: For which the King seised the Ward of the Heir of the Tenant. And afterwards, *anno quarto Jacobi Regis* that now is, after the Death of *Richard Male*, who was lineal Heir of the said *Robert Male*, by another Office it was found, That the said *Richard* died seised of the said Tenancy, and held the same of the King, as of his Dutchy, by Knights Service, his Heir within Age: Whereupon *Richard Hulm*, Cousin and Heir of the said *Richard Hulm*, had preferred a Bill to be admitted to his Traverse of the said Office found in 4 *Jac. Regis*: And the Question was, Whether the Office found in 35 *H.* 8. be any Estoppel to the said *Hulm*, to traverse the said last Office? Or if that the said *Hulm* should be driven first to traverse the Office of 35 *H.* 8.

Traverse of Office. See 4 Co. 43, 55 to 59. 6 Co. 8. 7 Co. 44, 45. 8 Co. 168.

And

And it was objected, That he ought first to traverse the Office of 35 *H.* 8. as in the first Case of 26 *E.* 3. 65. That if two Fines be levied of Lands in antient Demesne, the Lord of whom the Land is holden ought to have a Writ of Deceit to reverse the first Fine; and in that the second Fine shall not be a Bar: And that the first Office shall stand as long as the same remains in Force.

To which it was answered and resolved by the two Chief Justices and the Chief Baron, and the Court of Wards, That the Finding of an Office is not any Estoppel, for that is but an Enquest of Office, and the Party grieved shall have a Traverse to it, as it hath been confessed, and therefore without Question the same is no Estoppel; but when an Office is found falsly, that Land is holden of the King by Knights Service *in capite*, or of the King himself in Socage, if the Heir sueth a general Livery, now it is holden in 46 *E.* 3. 12. by *Mowbray* and *Persey*, that he shall not after add, that the Land is not holden of the * King; but that is not any Estoppel to the Heir himself who sueth the Livery, and shall not conclude his Heir: For so saith *Mowbray* himself expresly in 44 *Assis. pl.* 35. That an Estoppel by Suing of Livery shall estop only the Heir himself during his Life: And in 1 *H.* 4. 6. *b.* there the Case is put of express Confession and Suing of Livery by the Issue in Tail upon a false Office: And there it is holden, that the Jurors upon a new *Diem clausit extremum*, after the Death of such special Heir, are at large, according to their Conscience, to find that the Land is not holden, *&c.* for they are sworn *ad veritatem dicendum:* And there Finding is called *veredictum, quasi dictum veritatis*; which Reason also shall serve, when the Heir in Fee-simple sueth Livery upon a false Office, and the Jurors after his Death ought to find according to the Truth: So it is said 33 *H.* 6. 7. b. *Laicon*, that if two Sisters be found Heirs, whereof the one is a Bastard, if they join in a Suit of Livery, she which joineth with the Bastard in the Livery, shall not alledge Bastardy in the other: But there is no Book that saith, that the Estoppel shall endure longer than during his Life: And when Livery is sued by a special Heir, the Force and Effect of the Livery is executed and determined by his Death, and by that the Estoppel is expired with the Death of the Heir; but that is to be intended of a general Livery: But a special Livery shall not conclude one: But as is expressed, the Words of a general Livery are; when the Heir is found of full Age: *Rex Eschaetori, &c. Scias quod cepimus homagium* J. *filii & hæredis* B. *defuncti omnibus terris & tenementis quæ idem* B. *Pater suus tem*

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Co. Litt. 77. a.

Co. Litt. 226. a.

de nobis in capite, die quo obiit, & ei terras & tenement. illa reddidimus, ideo tibi præcipimus, &c. And when the Heir was in Ward, at his full Age, the Writ of Livery ſhall ſay, *Rex, &c. Quia* J. *filius & hæres* B. *defuncti qui de nobis tenuit in capite ætatem ſuam coram te ſufficienter probavit, &c. Ceperimus homagium ipſius* J. *de omnibus terris & tenementis, quæ idem* B. *Pater ſuus tenuit de nobis in capite die quo obiit, & ei terras & tenement. illa reddidimus, & ideo tibi præcipimus, ut ſupra, &c.* Which Writ is the Suit of the Heir, and therefore although that all the Words of the Writ are the Words of the King, as all the Writs of the King are; and although that the Livery be general, *de omnibus terris & tenementis de quibus* B. *pater* J. *tenuit de nobis in capite die quo obiit*, without direct Affirmation that any Manor in particular is holden *in capite*, and notwithſtanding that the ſame is not at the Proſecution of the King's Writ, and no Judgment upon it; yet becauſe the general Livery is founded upon the Office, and by the Office it was found, That divers Lands or Tenements were holden of the King *in capite*, for this Cauſe the Suing of the Writ ſhall conclude the Heir only which ſueth the Livery, and after his Death the Jurors in a new Writ of *Diem clauſit extremum*, are at large, as before is ſaid. And if that Jury find falſly in a Tenure of the King alſo, the Lord of whom the Land is holden may traverſe that Office: Or if Land be holden of the King, *&c.* in Socage, the Heir may traverſe the laſt Office, for by that he is grieved only; and he ſhall not be driven to traverſe the firſt Office: And when the Father ſueth Livery, and dieth, the Concluſion is executed and paſt, as before is ſaid. And note, that there is a ſpecial Livery, but that proceeds of the Grace of the King, and is not the Suit of the Heir, and the King may grant it either at full Age, before *ætate probanda, &c.* or to the Heir within Age, as it appeareth in 21 *E.* 3. 40. And that is general, and ſhall not comprehend any Tenure, as the general Livery doth, and therefore it is not any * Eſtoppel without Queſtion. And at the Common Law, a ſpecial Livery might have been granted before any Office found: But now by the Statute of 33 *H.* 8. *cap.* 22. it is provided, That no Perſon or Perſons, having Lands or Tenements above the yearly Value of 20 *l.* ſhall have or ſue any Livery, before Inquiſition or Office found, before the Eſcheator or other Commiſſion: But by an expreſs Clauſe in the ſame Act, Livery may be made of the Lands and Tenements compriſed or not compriſed in ſuch Office; ſo that if Office be found of any Parcel, it is ſufficient: And if the Land in the Office doth exceed 20 *l.* then

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the

the Heir may ſue a general Livery after Office thereof found, as is aforeſaid: But if the Land doth not exceed 5 *l.* by the Year, then a general Livery may be ſued without Office by Warrant of the Maſter of the Wards, *&c.* See 23 *Eliz. Dyer* 177. That the Queen *ex debito Juſtitiæ* is not bound at this Day, after the ſaid Act of 33 *H.* 8. to grant a ſpecial Livery; but it is at her Election to grant a ſpecial Livery, or to drive the Heir to a general Livery.

It was alſo reſolved in this Caſe, That the Office of 35 *H.* 8. was not traverſable, for his own Traverſe ſhall prove, that the King had Cauſe to have Wardſhip by Reaſon of Ward: And when the King cometh to the Poſſeſſion by a falſe Office, or other Means, upon a Pretence of Right, where in Truth he hath no Right, if it appeareth that the King hath any other Right or Intereſt to have the Land there, none ſhall traverſe the Office or Title of the King, becauſe that the Judgment in the Traverſe is, *Ideo conſideratum eſt, quod manus Domini Regis a poſſeſſione amoveantur, &c.* which ought not to be, when it appeareth to the Court, that the King hath Right or Intereſt to have the Land, and to hold the ſame accordingly. See 4 *H.* 4. *fol.* 33. in the Earl of *Kent*'s Caſe, *&c.*

XXIX. *Mich.* 7 Jac. *Regis.*

Parliament.

See Hale of Parliaments 159, 198, &c. Bohun's Collection 268 to 289. See Farſl. 13, &c.

NOte; the Privilege, Order, or Cuſtom of Parliament, either of the Upper Houſe, or of the Houſe of Commons, belongs to the Determination or Deciſion only of the Court of Parliament: And this appeareth by two notable Precedents.

The one at the Parliament holden in the 27th Year of King *Henry* the Sixth, there was a Controverſy moved in the Upper Houſe between the Earls of *Arundel* and of *Devonſhire*, for their Seats, Places, and Preheminences of the ſame, to be had in the King's Preſence, as well in the High Court of Parliament, as in his Councils, and elſewhere: The King, by the Advice of the Lords Spiritual and Temporal, committed the ſame to certain Lords of Parliament, who for that they had not Leiſure to examine

the ſame, it pleaſed the King, by the Advice of the Lords at his Parliament, *anno* 27 of his Reign, That the Judges of the Land ſhould hear, ſee, and examine the Title, *&c.* and to report what they conceive herein: The Judges made Report as followeth; That this Matter, (*viz.* of Honour and Precedency between the two Earls, Lords of Parliament) was a Matter of Parliament, and belongs to the King's Highneſs, and the Lords Spiritual and Temporal in Parliament, by them to be decided and determined; yet being thereto ſo commanded, they ſhewed what they found upon Examination, and their Opinions thereupon.

Another Parliament in 31 *H.* 6. which Parliament began the 6th * of *March*, and after it had continued ſome Time, it was prorogued until the Fourteenth of *February*: And afterwards in *Michaelmas-Term*, *anno* 31 *H.* 6. *Thomas Thorp*, the Speaker of the Commons Houſe, at the Suit of the Duke of *Buckingham*, was condemned in the Exchequer in 1000 *l.* Damages for a Treſpaſs done to him: The Fourteenth of *February*, the Commons moved in the Upper Houſe, That their Speaker might be ſet at Liberty, to exerciſe his Place: The Lords refer this Caſe to the Judges; and *Fortescue* and *Priſot*, the two Chief Juſtices, in the Name of all the Judges, after ſad Conſideration and mature Deliberation had amongſt them, anſwered and ſaid, That they ought not to anſwer to this Queſtion, for it hath not been uſed aforetime, That the Juſtices ſhould in any wiſe determine the Privilege of this High Court of Parliament; for it is ſo high and mighty in its Nature, that it may make Laws; and that, that is Law, it may make no Law: And the Determination and Knowledge of that Privilege belongeth to the Lords of the Parliament, and not to the Juſtices: But as for Proceedings in the lower Courts in ſuch Caſes, they delivered their Opinions. And in 12 *E.* 4. 2. in Sir *John Paſton*'s Caſe, it is holden, that every Court ſhall determine and decide the Privileges and Cuſtoms of the ſame Court, *&c.*

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See Bohun's Parliamentary Debates 276, 277.

XXX. *Hill.* 7 Jac. *Regis.*

In the Star-Chamber.

Heyward *and Sir* John Whitbroke's *Case.*

Star-Chamber Juriſdiction, &c.
See 12 Co. 84, 90.
4 Inſt. 60.

IN the Caſe between *Heyward* and Sir *John Whitbroke* in the Star-Chamber, the Defendant was convicted of divers Miſdemeanors, and Fine and Impriſonment impoſed upon him, and Damages to the Plaintiff: And it was moved that a ſpecial Proceſs might be made out of that Court to levy the ſaid Damages upon the Goods and Lands of the Defendant: And it was referred to the two Chief Juſtices, whether any ſuch Proceſs might be made? Who this Term moved the Caſe to the Chief Baron, and to the other Judges and Barons; and it was unanimouſly reſolved by them, That no ſuch Proceſs could or ought to be made, neither for the Damages nor for the Coſts given to the Plaintiff: For the Court hath not any Power or Juriſdiction to do it, but only to keep the Defendant in Priſon until he pay them. For, for the Fine due to the King, the Court of Star-Chamber cannot make forth any Proceſs for levying of the ſame, but they eſtreat the ſame into the Exchequer, which hath Power by the Law to write forth Proceſs to the Sheriff to levy the ſame. But if a Man be convicted in the Star-Chamber for Forgery upon the Statute of 5 *Eliz.* that in that Caſe, for the double Coſts and Damages, an *Engliſh* Writ ſhall be made, directed to the Sheriff, &c. reciting the Conviction, and the Statute for the Levying of the ſaid Coſts and Damages of the Goods and Chattels, and Profits of the Lands of the Defendant, and to bring in the Money into the Court of Star-Chamber, and the Writ ſhall be ſealed with the Great Seal, and the Teſt of the King: For the Statute of 5 *Eliz.* hath given Juriſdiction to the Court of Star-Chamber, and Power to give Judgment (amongſt other Things) of the Coſts and Damages, which being given by Force of the ſaid Act of Parliament, by Conſequence * the Court by the Act hath Power to grant Execution; *Quia quando aliquid conceditur, ei omnia concedi videntur per quæ devenitur ad illud.* And it was reſolved

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ſolved, That the Giving of the Damages to the Plaintiff was begun of late Times: And although that one or two Precedents were ſhewed againſt this Reſolution, they being againſt the Law, the Judges had not any Regard to them. The like Reſolution was in the Caſe of *Langdale* in that Court. See 12 Co. 58.

XXXI. *Hill.* 7 Jac. *Regis.*

In the Common Pleas.

Morſe *and* Webb's *Caſe.*

Preſcription for Common, &c. traverſed. See 4 Co. 12. 8 Co. 65. 9 Co. 33 to 36. 10 Co. 107, &c. 2 Saund. 314. 1 Mod. 74. 2 Lev. 2. 1 Salk. 170.

IN a Replevin brought by *John Morſe* againſt *Robert Webb* of the Taking of two Oxen the laſt Day of *November* in the third Year of the Reign of the King that now is, in a Place called the *Downfield* in *Luddington* in the County of *Worceſter:* The Defendant, as Bailiff to *William Sherington* Gent. made Conuſance, becauſe that the Place where is an Acre of Land which is the Freehold of the ſaid *William Sherington*, and for Damage-feaſants, &c. In Bar of which Avowry the Plaintiff ſaid, That the ſaid Acre of Land is Parcel of *Downfield*, and that he himſelf, at the Time, and before the Taking, &c. was and yet is ſeiſed of two Yard-Lands, with the Appurtenances, in *Luddington* aforeſaid: And that he, and all thoſe whoſe Eſtate he hath in the ſaid two Yards of Land, Time out of Mind, &c. have uſed to have Common of Paſture *per totum contentum* of the ſaid Place called the *Downfield*, whereof, &c. for four Beaſts called Rother-Beaſts, and two Beaſts called Horſe-Beaſts, and for ſixty Sheep, at certain Times and Seaſons of the Year, as to the ſaid two Yard-Lands, with the Appurtenances appertaining: And that he put in the ſaid two Oxen to uſe his Common, &c. And the Defendant did maintain his Avowry, and traverſed the Preſcription, upon which the Parties were at Iſſue, and the Jury gave a Special Verdict, That before the Taking, one *Richard Morſe*, Father of the ſaid *John Morſe*, and now Plaintiff, whoſe Heir he is, was ſeiſed of the ſaid two Yard-Lands, and that the ſaid *Richard Morſe*, &c. had

the Common of Paſture for the ſaid Cattle, *per totum contentum* of the ſaid *Downfield*, in Manner and Form as before is alledged; and ſo ſeiſed, the ſaid *Richard Morſe*, in the twentieth Year of Queen *Elizabeth*, demiſed to *William Thomas* and *John Fiſher* divers Parcels of the ſaid two Yard-Lands, to which, &c. *viz.* the four Buts of arable, with the Common and Intercommon to the ſame belonging, for the Term of Four hundred Years; by Force of which the ſaid *William Thomas* and *John Fiſher* entred, and were poſſeſſed: And the ſaid *Richard* ſo ſeiſed, died thereof ſeiſed; by which the ſaid two Yard-Lands in Poſſeſſion and Reverſion deſcended to the ſaid *John Morſe* the now Plaintiff: And if upon the whole Matter, the ſaid *John Morſe* now hath, and at the Time of the Taking, &c. had Common of Paſture, &c. for four Beaſts called Rother-Beaſts, and two Beaſts called Horſe-Beaſts, and for ſixty Sheep, &c. as to the ſaid two Acres of Land, with the Appurtenances belonging, in Law or not, the Jury prayed the Advice of the Court.

Note, That this Plea began *Trin.* 5 *Jacobi*, *Rot.* 1405.

Page [66] 1 Salk. 170. Cro. El. 794. 570.

And upon * Argument at the Bar, and at the Bench, it was reſolved by the whole Court, that it ought to be found againſt the Defendant, who had traverſed the Preſcription: For altho' that all the two Yard-Lands had been demiſed for Years, yet the Preſcription made by the Plaintiff is true; for he is ſeiſed in his Demeſne as of Fee of the Freehold of the two Yards of Land, to which, &c. And without Queſtion the Inheritance and Freehold of the Common, after the Years determined, is appendant to the ſaid two Yard-Lands; and therefore clearly the Iſſue is to be found againſt the Defendant: But if he would take Advantage of the Matter in Law, he ought (confeſſing the Common) to have pleaded the ſaid Leaſe; but when he traverſeth the Preſcription, he cannot give the ſame in Evidence.

2 Cro. 253. Cro. El. 570.

2, It was reſolved, That if the ſaid Leaſe had been pleaded, that the Common, during the Leaſe for Years, is not ſuſpended or diſcharged; for each of them ſhall have Common rateable, and in ſuch Manner, that the Land in which, &c. ſhall not be ſurcharged: And if ſo ſmall a Parcel be demiſed, which will not keep one Ox, nor a Sheep, then the whole Common ſhall remain with the Leſſor, ſo always as the Land in which be not ſurcharged.

3. It was reſolved, That Common appendant unto Land, is as much as to ſay, Common for Cattle levant and couchant upon the Land in which, &c. So that by the Severance of Part of the Land to which, &c. no Prejudice can come to the Terretenant in which, &c.

4. See

4. See the Case of . . in the fourth Part of my *Reports, fo.* . . was affirmed for good Law: And there is no Difference, when the Prescription is for Cattle levant and couchant, and when for a certain Number of Cattle levant and couchant: But when the Prescription is for Common appurtenant to Land without (alledging that it is for Cattle levant and couchant) there a certain Number of the Cattle ought to be expressed, which are intended by the Law to be levant and couchant.

2 Saund. 324. &c.
2 Cro. 574.
Q. 4 Co. 12, 31.

XXXII. *Hill.* 7 Jac. *Regis.*

In the Common Pleas.

Hughes *and* Crowther's *Case.*

IN a Replevin, between *Robert Hughs* Plaintiff, and *Richard Crowther* Defendant, which began *Trin.* 6 *Jacobi, Rot.* 2220. The Case was, That *Charles Fox* was seised of six Acres of Meadow in *Bedston*, in the County of *Salop*, in Fee, and 10 *Octob.* 9 *Eliz.* leased the same to *Charles Hibbens*, and *Arthur Hibbens* for sixty Years, if the aforesaid *Charles Hibbens* and *Arthur Hibbens* should so long live, and afterward *Charles* died; and if the Lease determine by his Death, was the Question; and it was adjudged, That by his Death the Lease was determined; for the Life of a Man is meer collateral unto the Estate for Years: Otherwise it is, if a Lease be made to one for the Lives of *J. S.* and *J. N.* there the Freehold doth not determine by the Death of one of them, for the Reasons and Causes given in the Case of *Brudnel*, in the fifth Part of my *Reports, fol.* 9. Which Case was affirmed to be good Law by the whole Court.

Leases.
1 Co. 155.
3 Co. 19.
5 Co. 9, 29.
6 Co. 26, 35.
11 Co. 3.
1 Mod. 187.

Page [67] * XXXIII. *Paſch.* 8 Jac. *Regis.*

In the Common Pleas.

Heydon *and* Smith's *Caſe.*

Manor Cuſtoms. See Lex Manerior. 61 to 67. 1 Roll. Abr. 499. 4 Co. 24, 29. 8 Co. 63. 1 Roll. Abr. Tit. Cuſtom E. 16. 1 Leon. 238. Cro. Car. 221.

Richard Heydon brought an Action of Treſpaſs againſt *Michael Smith* and others, of Breaking of his Cloſe called the *Moor* in *Ugley* in the County of *Eſſex*, the 25th Day of *June* in the fifth Year of the King, & *quandam arborem ſuam ad valentiam* 40 *s. ibidem nuper creſcen. ſuccciderunt:* The Defendants ſaid, that the Cloſe is, and at the Time of the Treſpaſs was the Freehold of Sir *John Leventhrop* Knight, &c. and that the ſaid Oak was a Timber-Tree of the Growth of thirty Years and more, and juſtifies the Cutting down of the Tree by his Commandment: The Plaintiff replieth and ſaith, That the ſaid Cloſe, and a Houſe and twenty-eight Acres of Land in *Ugley*, are Copyhold, and Parcel of the ſaid Manor of *Ugley*, &c. of which Manor *Edward Leventhrop* Eſquire, Father of the ſaid Sir *John Leventhrop*, was ſeiſed in Fee, and granted the ſaid Houſe, Lands and Cloſe to the ſaid *Richard Heydon* and his Heirs by the Rod, at the Will of the Lord, according to the Cuſtom of the ſaid Manor: And that within the ſaid Manor there is ſuch a Cuſtom, *Quod quilibet tenens Cuſtomar. ejuſdem Manerii ſibi, & heredibus ſuis, ad voluntatem Domini, &c. a toto tempore ſupradicto uſus fuit, & conſuevit ad ejus libitum amputare ramos omnimodarum arborum*, called Pollingers, or Huſbords, *ſuper terris & tenem. ſuis Cuſtomar. creſcen. pro ligno combuſtibili, ad* like *libitum ſuum applicand. & in prædicto Meſſuagio comburend.* and alſo to cut down and take at their Pleaſure all Manner of Trees called Pollengers or Huſbords, and all other Timber-Trees, *ſuper ejuſdem Cuſtumariis ſuis creſcen.* for the Reparation of their Houſes built upon the ſaid Lands and cuſtomary Tenements; and alſo for Ploughbote and Cartbote, and that all Trees called Pollengers or Husbords, and all other Trees at the Time of the Treſpaſs aforeſaid, or hitherto growing upon the aforeſaid

1 Brownl. 132. 4 Co. 30.

ſaid Lands and Tenements cuſtomary of the ſaid *Richard Heydon*, were not ſufficient, nor did ſerve for the neceſſary Uſes aforeſaid: And that the ſaid *Richard Heydon*, from the Time of the ſaid Grant made unto him, had maintained and preſerved all Trees, *&c.* growing upon the ſaid Lands and Tenements to him granted: And that after the Death of the ſaid *Edward Leventhrop*, the ſaid Manor deſcended to the ſaid Sir *John Leventhrop:* And that at the Time of the Treſpaſs the aforeſaid Meſſuage of the ſaid *Richard Heydon* was in Decay, *& egebat neceſſariis reparationibus in Maremio ejuſdem.* Upon which the Defendant did demur in Law.

And this Caſe was oftentimes argued at the Bar: And now this Term it was argued at the Bench by the Juſtices: And in this Caſe theſe Points were reſolved.

1. That the firſt Part of the Cuſtom was abſurd and repugnant, *ſcil. Quod quilibet tenens Cuſtomarii ejuſdem Manerii habens & tenens aliquas * terras ſeu tenementa Cuſtom. &c. uſus fuit amputare ramos omnimodarum arborum, vocat.* Pollingers, *&c. pro ligno combuſtibili, &c. in prædicto Meſſuagio comburend.* (which ought to be in the Meſſuage of the Plaintiff, for no other Meſſuage is mentioned before) which is abſurd and repugnant, That every cuſtomary Tenant ſhould burn his Fuel in the Plaintiff's Houſe: But that Branch of the Cuſtom doth not extend unto this Caſe: For the laſt Part of the Cuſtom, which concerneth the Cutting down of the Trees, concerns the Point in Queſtion; and ſo the firſt Part of the Cuſtom is not material.

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Moor 47, 94, 392, 456, 811.
4 Co. 30.
8 Co 63.
2 Salk. 368.

It was objected, That the Pleading, that the Meſſuage of the Plaintiff was in Decay, *& egebat neceſſariis reparationibus in maremio ejuſdem*, was too general: For the Plaintiff ought to have ſhewed in particular, in what the Meſſuage was in Decay: As the Book is in 10 *E.* 4. 3. He who juſtifieth for Houſebote, *&c.* ought to ſhew that the Houſe hath Cauſe to be repaired, *&c.*

To which it was anſwered by *Coke* Chief Juſtice, That the ſaid Book proveth the Pleading in the Caſe at Bar was certain enough, *ſcil. Quod Meſſuagium prad. egebat neceſſariis reparationibus in maremio*, without ſhewing the preciſe Certainty: And therewith agrees 7 *H.* 6. 38. and 34 *H.* 6. 17.

2. It was alſo anſwered and reſolved, That in this Caſe without Queſtion it needs not to alledge more Certainty, for here the Copyholder according to the Cuſtom doth not take it, but the Lord of the Manor doth cut down the Tree, and carrieth it away where the reſt was not ſufficient, and ſo preventeth the Copyholder of his Benefit, and therefore he

needeth not to ſhew any Decay at all, but only for increaſing of the Damages, for the Lord doth the Wrong when he cutteth down the Tree which ſhould ſerve for Reparations when need ſhould be.

Eſtovers. 2 Brownl. 229. 2 Bulſt. 281. Godb. 173.

3. It was reſolved, That of Common Right, as a Thing incident to the Grant, the Copyholder may take Houſebote, Hedgbote and Plowbote upon his Copyhold: *Quia conceſſo uno conceduntur omnia ſine quibus id conſiſtere non poteſt: Et quando aliquis aliquid concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt*: And therewith agreeth 9 *H.* 4. *Waſte* 59. But the ſame may be reſtrained by Cuſtom, *ſcil.* That the Copyholder ſhall not take it unleſs by Aſſignment of the Lord or his Bailiff, *&c.*

4. It was reſolved, That the Lord cannot take all the Timber-Trees, but he ought to leave ſufficient for the Reparation of the cuſtomary Houſes, and for Ploughbote, *&c.* for otherwiſe great Depopulation will follow; *ſcil.* Ruin of the Houſes, and Decay of Tillage and Husbandry.

Bote, its Signification. See Co. Lit. 41. b. and 127. Spelman in verbo. Verſtegan. 249. Whitlock's M.S. in verbo.

And it is to be underſtood, That *Bote* being an ancient *Saxon* Word, hath two Significations; the one *compenſatio criminis*, as *Frithbote*, which is as much as to ſay, to be diſcharged from giving amends for the Breach of the Peace; *Manbote*, to be diſcharged of Amends for the Death of Man: And ſecondly, in the later Signification, (*ſcil.*) for Reparation, as was Bridgbote, Burgbote, Caſtlebote, Parkbote, *&c. ſcil.* Reparation of a Bridge, of a Borough, of a Caſtle, of a Park, *&c.* And it is to be known, that *Bote* and *Eſtovers* are all one: *Eſtovers* are derived of this *French* Word, *Eſtover*, *i. e. fovere*; *i. e.* to keep warm, to cheriſh, to ſuſtain, to defend: And there are four Kinds of *Eſtovers*, (*ſcil.*) *ardendi*, *arandi*, *conſtruendi*, & *claudendi*: (*ſcil.*) Firebote, Houſebote, Ploughbote, and Hedgbote.

5. It was reſolved, That the Copyholder ſhall have a general Action of Treſpaſs againſt the Lord, *Quare clauſum fregit, & arborem * ſuam, &c. ſuccidit*; for Cuſtom hath fixed it to his Eſtate againſt the Lord: And the Copyholder in this Caſe hath as great an Intereſt in the Timber-Trees, as he hath in his Meſſuage which he holdeth by Copy; And if the Lord breaketh or deſtroyeth the Houſe, without Queſtion the Copyholder ſhall have an Action of Treſpaſs againſt his Lord, *Quare Domum fregit*, and by the ſame Reaſon for the Timber-Trees which are annexed to the Land, and which he may take for the Reparation of his Copyhold Meſſuage, and without which the Meſſuage cannot ſtand. *Trin.* 40 *Eliz. Rot.* 37. in the King's Bench,

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Bench, between *Stebbing* and *Groſener*, the Cuſtom of the Manor of *Netherhall* in the County of *Suffolk* was, that every Copyholder might lop the Pollengers upon his Copyhold *pro ligno combuſtibili*, &c. And the Lord of the Manor cut down the Pollingers, being upon the Plaintiff's Copyhold, upon which he brought his Action upon the Caſe, becauſe that the Lops of the Trees in ſuch Caſe did belong to the Copyholder, and they were taken by the Lord. See *Taylor*'s Caſe in the fourth Part of my *Reports* 30 and 31. and ſee 5 *H.* 4. 2. Guardian in Knight-Service, who hath *Cuſtodiam terræ*, ſhall have an Action of Treſpaſs for cutting down the Trees againſt the Heir who hath the Inheritance. *Vide* 2 *H.* 4. 12. A Copyholder brought an Action of Treſpaſs, *Quare clauſum fregit, & arbores ſuccidit*: And ſee 2 *E.* 4. 15. A Servant who is commanded to carry Goods to ſuch a Place, ſhall have an Action of Treſpaſs or Appeal: 1 *H.* 6. 4. 7 *H.* 4. 15. 19 *H.* 6. 34. 11 *H.* 4. 28. If after taking the Goods, the Owner hath his Goods again, yet he ſhall have a general Action of Treſpaſs, and upon the Evidence the Damages ſhall be mitigated: So is the better Opinion in 11 *H.* 4. 23. That he who hath a ſpecial Property of the Goods at a certain Time, ſhall have general Action of Treſpaſs againſt him who hath the general Property, and upon the Evidence Damages ſhall be mitigated; but clearly, the Bailee, or he who hath a ſpecial Property, ſhall have a general Action of Treſpaſs againſt a Stranger, and ſhall recover all in Damages, becauſe that he is chargeable over. See 21 *H.* 7. 14. *b. acc.* And it is holden in 4 *H.* 7. 3. That Tenant at Sufferance ſhall have an Action of Treſpaſs in reſpect of the Poſſeſſion, and if the Defendant plead Not guilty, but he cannot make Title, 30 *H.* 6. *Treſpaſs* 10. 15 *H.* 7. 2. the King, who hath Profits of the Land by Outlawry, ſhall have an Action of Treſpaſs, or take Goods Damage-Feſants: 35 *H.* 6. 24. 30 *H.* 6. *Treſp.* 10, &c. Tenant at Will ſhall have an Action of Treſpaſs: 21 *H.* 7. 15. and 11 *H.* 4. 23. If a Man bail Goods which are taken out of his Poſſeſſion, if the Bailee recover in Treſpaſs, the ſame ſhall be a good Bar to the Bailee: 5 *H.* 4. 2. In a Writ of Waſte brought againſt Tenant for Life, and aſſigned the Waſte in cutting down of Trees; the Defendant pleaded in Bar, that the Plaintiff himſelf cut them: And *Culpeper*, the Serjeant of the Plaintiff, objected againſt it, that it ſhould be no Plea, becauſe the Defendant had not any Thing in the Freehold, no more than a meer Stranger; and if a Stranger had cut down the ſame Trees, he ſhould be chargeable in the Waſte.

Cro. El. 6. 9. Godb. 173. 2 Bulſt. 281. 2 Brownl. 229.

Alſo in this Caſe, we ſhould be at a Miſchief if we ſhould not recover againſt him; for if at another Time he bringeth an Action of Treſpaſs againſt us, he ſhall recover Damages againſt us for the Cutting, *id eſt*, for the Value of the Trees: And yet it was holden by the Court, that the ſame was a good Bar: And it was ſaid by the Court that the Plaintiff was not at any Miſchief in this Caſe: For in as much as the Defendant * ſhall have Advantage now to diſcharge himſelf of Waſte againſt the Plaintiff, upon this Matter he ſhall be barred for ever of his Action of Treſpaſs, *ſcil.* to recover the Value of Trees, which was the Miſchief objected by *Culpeper*: But without Queſtion he ſhall have an Action of Treſpaſs, *Quare clauſum fregit*, for the Entry of the Leſſor, and for the Cutting of the Trees, but he ſhall not recover the Value of the Trees, becauſe he is not chargeable over, but for the ſpecial Loſs which he hath, *ſcil.* for the Loſs of the Pawnage, and of the Shadow of the Trees, *&c.* See *Fitz.* Treſpaſs *ultimo*, in the Abridgment: And afterwards, the ſame Term, Judgment was given on the principal Caſe for the Plaintiff.

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XXXIV. *Paſch.* 8 Jacobi.

In the Common Pleas.

Pariſh-Clark.

See Gibſon's Cod. 240. 1 Salk. 536. 1 Roll. 227. Rep. Canon. 367, 565, 567.

THE Pariſhioners of St. *Alphage* in *Canterbury* by Cuſtom ought to chuſe the Pariſh-Clark, whom they chuſe accordingly: The Parſon of the Pariſh, by Colour of a new Canon made at the Convocation in the Year of the King that now is (which is not of Force to take away any Cuſtom) drew the Clark before Doctor *Newman*, Official of the Archbiſhop of *Canterbury*, to deprive him, upon the Point of the Right of Election, and for other Cauſes; and upon that it was moved at the Bar to have a Prohibition: And upon the Hearing of Doctor *Newman* himſelf, and his Counſel, a Prohibition was granted by the whole Court, becauſe the Party choſen is a

Prohibition.

meer

meer temporal Man, and the Means of chusing of him, *scil.* the Custom, is also meer Temporal, so as the Official cannot deprive him; but upon Occasion the Parishioners might displace him; and this Office is like to the Office of a Church-warden, who although they be chosen for two Years, yet for Cause they may displace them, as it is holden in 26 *H.* 8. 5. And although that the Execution of the Office concerneth Divine Service, yet the Office it self is meer Temporal. See 3 *E.* 3. *Annuity* 30. He who is Clark of a Parish is removeable by the Parishioners. See 18 *E.* 3. 27. A Gift in Tail was made of the Serjeanty or Clarkship of the Church of *Lincoln*, and there adjudged, that the Office is Temporal, and shall not be tried in the Ecclesiastical Court, but in the King's Court: And it is to be known, that the Deprivation of a Man of a temporal Office or Place, is a temporal Thing, upon which no Appeal lieth by the Statute of 25 *H.* 8. but an Assise, as in 4 *Eliz. Dyer* 209. The President of *Magdalen-College* in *Oxford* was deprived of the Bishop of *Winchester* their Visitor; he shall not have an Appeal to the Delegates, for the Deprivation is Temporal, and not Spiritual; but he may have an Assise: And therewith agreeth the Book of 8 *Ass. Siracse*'s Case: But if a Dean of a Cathedral Church, of the Patronage of the King, be deprived before the Commissioners of the King, he may Appeal to the Delegates within the said Act of 25 *H.* 8. For a Deanery is a Spiritual Promotion, and not Temporal: And before the said Act, in such Case, the Appeal was to *Rome* immediately.

Antea 8, 9. &c. 17, 18, 41, &c.

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*XXXV. *Mich.* 5 Jac. *Rot.* 30.

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In the King's Bench.

Prichard *and* Hawkin's *Case.*

John Prichard brought an Action upon the Case against *Robert Hawkins* for slanderous Words published the last Day of *August* in the third Year of the King, *viz.* That *Prichard* which serveth Mistress *Shelley*, did murder

Slander. See 1 Dany. 104. pl. 6, 12, and 14. 107, 108. pl. 9. 140, 141. pl. 1, 10 pl. 5.

murder *Joan Adams* Child, (*Quandam Iſabellam Adams modo defunct. filiam cujuſdam Johannis Adams*, of *Williamſtre* in the County of *Glouceſter*, *innuendo*) upon which a Writ of Error was brought in the Exchequer-Chamber upon a Judgment given for *Prichard* in the King's Bench: And the Judgment was reverſed in *Eaſter-Term*, 7 *Jacobi*, becauſe it doth not appear, that *Iſabel* was dead at the Time of the Speaking the Words, for *tunc defunct.* ought to have been in the Place of *modo defunct.*

XXXVI. *Paſch.* 8 Jacobi.

In the King's Bench.

Diſon *and* Beſtney's *Caſe.*

Slander. Anrea 59. See 1 Danv. 713. pl. 14, 16, 27. 117. pl. 141, 43. 119. pl. 58. 2 Salk. 691.

Humphrey Diſon ſaid of *Nicholas Beſtney*, utter Bareſter and Counſellor of *Gray's Inn*, *Thou a Bareſter? Thou art no Bareſter, thou art a Barretor; thou wert put from the Bar, and thou dareſt not ſhew thy ſelf there. Thou ſtudy Law? Thou haſt as much Wit as a Daw.* Upon Not guilty pleaded, the Jury found for the Plaintiff, and aſſeſſed Damages to 23 *l.* upon which Judgment was given: And in a Writ of Error in the Exchequer-Chamber, the Judgment was affirmed.

XXXVII. *Paſch.*

XXXVII. *Pasch.* 8 Jac. *Regis.*

In the King's Bench.

Smith *and* Hill's *Case.*

Noah *Smith* brought an Action of Assault and Battery against *Walter Hill* in the King's Bench, which began *Pasch.* 7 *Jacobi*, *Rot.* 175. upon Not guilty pleaded, a Verdict and Judgment was for the Plaintiff, and 107 *l.* assessed for Damages and Costs. In a Writ of Error brought in the Exchequer-Chamber, the Error was assigned in the *Venire facias*, which was certified by Writ of *Certiorari*: And upon the Writ no Return was made upon the Back of the Writ, which is called *Returnum album*; and for that Cause, this *Easter-Term* the Judgment was reversed.

Error. Return alb. Qr. 5 Co. 2. Part 39, to 47. 1 Danv. 180. pl. 13.

* XXXVIII. *Trin.* 7 Jacobi.

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In the Court of Wards.

Westcot's *Case.*

It was found by a Writ of *Diem clausit extremum*, after the Death of *Roger Westcot*, That the said *Roger* the Day that he died was seised of and in the Moiety of the Manor of *Trewalliard* in his Demesn as of Fee, and of such his Estate died thereof seised: And that the Moiety of the said Manor, *Anno* 19 *E.* 3. was holden of the then Prince, as of his Castle of *Trematon*, Parcel of his Dutchy of *Cornwall*, by Knights-Service, as it appeareth by a certain Exemplification of *Trematon* for the same Prince, made 9 *Martii*, 19 *E.* 3. And the Words of the Extent, were *Willielmus*

Diem clausit extremum. Vide ant. 48, 49, 50. 12 Co. 102.

Willielmus de Torr tenet duo feoda & dimid. militis apud Pick, Strikleſtomb, & Trewalliard, *per ſervitium militare, & reddit inde per Annum* 8 *d.* And it was reſolved by the two Chief Juſtices, and the Chief Baron, That the Office concerning the Tenure was inſufficient and void, becauſe that the Verdict of a Jury ought to be full and direct, and not with a *prout patet*, for by that the whole Force of the Verdict reliseth only upon the Extent, which if it be falſe, he who is grieved ſhall have no Remedy by any Traverſe; for they have not found the Tenure indefinite which might be traverſed, but with a *prout patet*, which makes the Office in that Point inſufficient, and upon that a *Melius inquirendum* ſhall Iſſue forth: And therewith agreeth *F. N. B.* 255. that a *Melius inquirendum* ſhall be awarded in ſuch a Caſe.

Vide ant. 48, 50.

Anno 41. Eliz. 568.

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THE TABLE.

A.

B.

C.

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